



# MERCANTILE LAW

(INCLUDING INDUSTRIAL LAW)

BY

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OF

INDIAN COMPANY LAW'', 'CIVIL WRONGS AND  
THEIR LEGAL REMEDIES'', 'SOCIETY  
AND THE CRIMINAL''

*SECOND EDITION*

*Revised and Enlarged*

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**To the Sacred Memory  
of  
My Dear Father**



## PREFACE TO THE SECOND EDITION

This edition has been carefully revised and brought up-to-date. Amendments in the law, e.g., in the law relating to Carriage of Goods by Railways, in the law relating to registered Companies, have been noted. Comprehensive Chapters on the Company Law, amended by the Indian Companies (Amendment) Act, 1951, and on the Law of Banking Companies, make this work now a comprehensive book on Mercantile Law. Of course, Company Law is in itself a subject for a separate treatise, by reason of its great importance and length ; nevertheless an adequate treatment of the subject can be had in a single lengthy chapter in a book on Mercantile Law. That has been done in this edition. The inclusion of the Texts of the Indian Contract Act, the Indian Sale of Goods Act, the Indian Partnership Act, the Negotiable Instruments Act, lend a further utility to this book.

I have thought it fit to include in this edition the law relating to factories, workmen's compensation and payment of wages, as these are important topics in Industrial Law. The inclusion of Industrial Law will make this edition very useful also to students of the Universities by the syllabuses of which Industrial Law also has been prescribed for study for the B. Com. Degree Course.

The same easy and lucid Chapter by Chapter style has been kept up in this edition, and I am sure the students will find in this work all that they need for a detailed, thorough and scholastic study of Mercantile Law. Businessmen and practitioners will find in this edition a very useful book of ready reference.

My thanks are due to the Standard Accountancy Publications Ltd., for every facility afforded, and to the British India Press, Bombay, for the neat, speedy and efficient printing. I am thankful to B. D. Birdy, Esq., B.Com., F.C.A., Chartered Accountant, Bombay, Prof. S. K. Dutt, M. A., B.Com., of Calcutta, Prof. U. V. Desai, M.A., LL.B., Advocate (O.S.), Bombay, Prof. N. K. Desai, B.A., LL.B., Advocate(O.S.), Bombay, and Prof. R. C. Shukla, M. Com., LLB., Bhopal, for some valuable suggestions.

November, 1951.

M. J. Sethna.

## PREFACE TO THE FIRST EDITION

I have great pleasure in laying before the Mercantile Community, the student world, and our practitioners, this lucid and comprehensive work on the Mercantile Law. My success with my work: Indian Company Law, and the earnest requests of my students, that, with all my experience of over twelve years in the teaching of Mercantile Law and Company Law and Practice, I should write a book on Mercantile Law, in a novel style, have led me to the writing and the publishing of this text book which, I am confident, will receive warm welcome.

This book is meant to serve the purpose of a comprehensive text book for the students reading for the various law and commerce examinations, including the higher, examinations; the work is made very useful for the business man by the inclusion of business expressions and several very useful Forms. List of Stamp Duties on Documents, and a list of Periods of Limitation are also given; these very much augment the practical utility of this work and constitute it a valuable handy reference book for the practitioners also.

Commercial Law is a subject of growing importance and interest; and no man of business can do well without a good knowledge of it; a fortiori so, in an age of complicated laws. To the business man the subject of Mercantile Law is as useful and important as Company Law; hence every businessman should have a fairly good knowledge of the various and vast studies included in the scope of Mercantile Law.

For helping me in examining the proofs of this work, my thanks are due to Mrs. J. M. Sethna, Mrs. Khorshed M. J. Sethna, M.A., B.T., L.T., and R. J. Sethna, Esq., B.A., B.Sc., B.E. (Civil), LL.B.

My thanks are due for the help received from the interesting and illuminative article: Registrable Trade Marks, by K. S. Shavaksha, Esq., B.A., (Oxon), Barrister-at-Law, published in the Indian Law Review, Vol. I, 1947.

I thank the British India Press, Bombay, for having afforded facilities and for the efficient and neat execution of the printing of this work.

July 1949.

M. J. S.

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## INTRODUCTION

### MEANING, SCOPE, ORIGIN AND GROWTH OF INDIAN MERCANTILE LAW.

#### What is Indian Mercantile Law ?

Indian Mercantile Law is all that body of laws governing the business relations and the commercial activities of men in civilised society. Commercial or Mercantile Law, also known as the Law Merchant (the *Lex Mercatoria*), embraces all the legal rules concerning business transactions. It includes within its scope a variety of subjects—it includes every legal principle affecting or governing business transactions.

Indian Mercantile Law deals, *inter alia*, with the legal principles relating to valid agreements and says how valid contracts can be made and entered into. It lays down certain principles of law—well established by business custom and usages of trade—regarding the various mercantile transactions. It deals, for example, with contracts of partnership, sale of goods, agency, bailment, contracts regarding bills, promissory notes, hundis and cheques, it deals with different kinds of insurance and regulates the doing of insurance business. It deals with the law relating to Carriage, Arbitration, Insolvency, and limitation of suits. It deals also with the law relating to registered Companies, and the law relating to the protection of incorporeal property rights, such as rights relating to trade-marks, trade-names, copyright and patents.

#### Origin and Growth of Indian Mercantile Law

**Sources.**—The Indian Mercantile Law owes its origin in Custom and Usages of Trade. As has been said, usages of trade and conventions guide and make the law. In order, however, that a custom may be accepted by a law Court, it must be reasonable and well established. The custom sought to be accepted by the law must have well stood the test of time. Even today, customs and conventions can override the law (*Modus et conventio vincunt legem*).

With the raw material of customs the judges in Courts of law wrought up their judgments. This important contribution of the judges is found in what is known as the **Common Law** of England. The Common Law or the Unwritten Law of England implies all those judicial decisions found scattered in the law reports, and based on customs. The law reporters heralded to the world these decisions which soon got the force of precedents, *i.e.*, judgments to be followed by brother judges whenever the same point of law is involved.



Then followed the Acts of the Legislature giving effect to the principles of law as laid down by the judges, and giving effect also to the usages of trade.

The laws made by the Legislature are given effect to by the judges who **interpret** and explain the law. That gives us what are known as the **precedents** made by the judges. Precedents are cited in the Courts, with a view to helping the Court to arrive at its decision. A precedent made by the Privy Council is binding upon Courts in India.

Then followed the principles of Justice, Equity and Good Conscience to modify the law, make it more flexible and more in accordance with the principles of natural justice—to act like a filter on the lens of the law and thus soften it and remove its rigidity.

**The History of the Lex Mercatoria.**—The Law Merchant is originated in custom. In times of old, evidence of custom was recorded by the judges who on the strength of such evidence based their decisions. If the Court was satisfied that a custom or usage of trade was a reasonable one, well recognized by lapse of time, it accepted and gave effect to such custom. The decisions given by the judges constituted the Common Law of England. The Common Law was supplemented by Acts of the Legislature.

In the reign of Queen Anne, Lord Chief Justice Holt rendered a good deal of service in this branch of the Lex Civile. And in the reign of George III, Lord Chief Justice Mansfield, by recognizing the customs and usages of trade as evidenced by merchants of repute, laid the foundation of the Mercantile Law.

Later, the principles of the Common Law were supplemented by the principles of justice, equity and good conscience. To make the rigid principles of the law more flexible and in consonance with justice, equity came in like a filter that acts on the lens of a camera.

In India before the passage of the Indian Contract Act, 1872, the Mercantile Law was in no way settled or uniform. If both the parties to the dispute were Hindus, the Hindu Law was applied to determine the dispute; if both were Mahomedans, the Mahomedan Law was applied. If the parties were of different communities the law of the defendant was applied. In the case of persons other than Hindus and Mahomedans, the principles of the English Law were applied, in the jurisdiction of the High Courts; in places outside the Presidency towns, the judge was at liberty to apply the rules of justice, equity and good conscience.

With the passage of the Indian Contract Act, 1872, the law was made uniform. The Hindu Law, as also the Mahomedan Law, ceased to be applicable, **as regards mercantile transactions**. It

may be noted that nothing in the Indian Contract Act, 1872, affects any well-recognized custom or usage of trade. For example, the Hindu Law rule of Damdupat, according to which a Hindu debtor is not bound to pay at any one time a sum of money, by way of interest, exceeding the principal, is still applicable, and is recognised by the Bombay High Court and by the Calcutta High Court. According to the Bombay High Court, it is sufficient ground, for application of the rule, that the original debtor is a Hindu. According to the Calcutta High Court, which recognises the rule in its ordinary original jurisdiction, both the parties must be Hindus. So also, the Mahomedan Law rule of pre-emption is another example of the application of custom.

### **The Extent to which the Indian Law Merchant follows the English Law**

Most of the Indian Commercial Law is based on the English Mercantile Law. Where some Indian custom or usage of trade differs from a corresponding English usage, the Indian Law deviates from the corresponding well established English principle. Indian Law follows the English Law so far as Indian conditions permit. With some points of difference, the Indian Companies Act, for example, follows the English Companies Act. So also where an Indian Law or Statute is so drafted as to differ from a corresponding English law or statute, the Courts in India must follow what is in the Indian Law, and not what is in the English Law.

### **Indian Commercial Law mostly codified**

In India most of the Mercantile Law is codified, *i.e.*, embodied in Acts of the Legislature. Where the corresponding English Law is in the same words as the Indian section, the English decisions do apply, here also. Also where the Indian Law is silent on a point, the English decisions apply, if the Indian custom or conditions do not disallow such application and if the legislature has not deviated deliberately. In India, English decisions are of a guiding and persuasive, but not of a binding, efficacy.

# CHAPTER I

## CONTRACTS UNDER THE ENGLISH LAW

### Specialty Contracts and Parol Contracts

Contracts, in English Law, are either (1) **specialty contracts**, also known as **deeds or contracts under seal**, or (2) **parol or simple contracts**.

A specialty contract or deed is a contract under seal. Such a contract must be signed, sealed, and delivered by the promisor to the promisee. The contract may be written or printed or typed or otherwise contained on paper or parchment.

A simple (or parol) contract is a contract which is not under seal. Such a contract may be oral or in writing ; it may be express or implied.

### Distinction between Indenture and Deed Poll

At one time an indenture used to be distinguished from a deed poll, an indenture being a document having its edges indented, but a deed poll having a square cut. There is no difference now so far as the legal consequences of such documents are concerned. Both have the same legal tenacity, validity and consequences.

### Specialty Contracts and Simple (or parol) Contracts distinguished

(1) Specialty contracts are **under seal**, either as indenture or deed poll. Simple or parol contracts are contracts which are **not under seal** ; simple or parol contracts may be express, implied, oral or in writing.

(2) A specialty contract requires no consideration ; but a simple contract requires consideration.

(3) In a specialty contract, statements made in it are conclusive evidence or proof of their truth ; oral evidence cannot be given, in a Court of law, to dispute or falsify such statement in the contract, unless fraud, mistake or duress is proved. But in a simple or parol contract, oral evidence can be given to dispute the correctness of a statement in such contract, as such statement is only presumptive and not conclusive evidence.

(4) A right arising out of a simple or parol contract is barred if not exercised for six years ; but in a specialty contract the period of limitation is 20 years, *i.e.*, the right arising out of such a contract becomes barred if not exercised for 20 years, or in some cases 12 years.

## Estoppel by Deed

In a specialty contract (under seal) there may be a statement made by one party only (but not by the other party) to the contract. In such a case that statement binds that party **alone**, and not the other party. This is known as "**estoppel by deed**", i.e., that particular party is prevented from denying his own statement, unless he proves that he made that statement due to mistake or fraud, the other party or because of duress by the other party.

## Document "Escrow"

A document is said to be "*escrow*" when its operation is made conditional and it is handed over to a party other than a party to the contract to hold it till the happening of the contingency.

## Contracts required to be in writing, under the English Law

Under Section 4 of the Statute of Frauds:—

(1) A contract for sale of goods of the value of £ 10 or upwards must be in writing, or there must be some note or notes, or memorandum or some other evidence in writing, or evidence otherwise to witness the existence of such a contract (e.g., the fact that the contract has already been performed in part—that a part of the goods have been delivered to and accepted by the buyer—or that the buyer has paid some earnest money or deposit for the performance of his contract).

A enters into a contract with B to sell to him goods (viz. 100 hundred bags of flour). The price payable exceeds £ 10. The contract is not in writing, but the buyer has paid £ 5, by way of earnest money or deposit. Can the oral contract be enforced at law? Yes, though the contract is not in writing, it can be enforced because there has been a payment of earnest money, and that fact shows that there is a contract of the type alleged. The same would have been the result, if there had been, instead of payment of earnest money, a part performance of the contract by A. In *Carlisle v. The Bank of India*, however, the Courts in those days did not recognize the rule. The rule within the British Empire is now well recognized by the provisions of the Indian Contract Act. [Sec. 1]

## **CHAPTER II**

### **The Law of Contracts forms the substratum of the Commercial Law**

The law relating to contracts forms, so to say, the substratum of the mercantile law. As much of the commercial law is based on the law relating to agreements, it is of great importance that the reader should have a thorough understanding of this branch of the law.

### **What is the Law of Contracts ?**

The law relating to Contracts is the law that deals mainly with valid agreements, *i.e.* agreements enforceable at law.

In law, a contract is an agreement which is enforceable at law. All contracts are agreements, but all agreements are not contracts. An agreement may be for an illegal object, or may be between parties who are not capable of entering into it; or it may be entered into through mistake common to both the parties; in any of such cases the agreement is not a contract for it is not enforceable at law.

### **The various Acts relating to Contracts**

We have the Indian Contract Act, 1872, which deals with the general principles embodying Contracts. The Act mentions the elements necessary for a valid contract; it says what persons are capable of entering into enforceable agreements; it mentions the cases in which agreements which are not absolutely unenforceable are enforceable at the option of only one of the parties to the contract; it declares certain kinds of agreements void as being opposed to public policy; it deals with suretyship agreements and agreements of agency; it deals with the general principles of the law relating to valid and enforceable agreements.

We have the Indian Sale of Goods Act, 1930, which deals with the law relating to contracts of sale or purchase of goods.

The Negotiable Instruments Act, 1881, deals with contracts of promissory notes, bills of exchange and cheques.

The Indian Partnership Act, 1932, lays down important provisions relating to partnership contracts, and mentions the rights, duties and liabilities of partners, and the rights, duties and liabilities of outsiders dealing with the partners of a firm. It says how it differs from a registered company, and makes provisions for the liquidation of firms.

The Indian Insurance Act makes important provisions

## CHAPTER III

### ESSENTIALS OF VALID AGREEMENT

A valid agreement is called a **contract**. All contracts are agreements, but all agreements are not contracts.

A contract implies an **agreement** between two or more persons to do or not to do something ; when one of the parties to the agreement signifies to the other party or parties his willingness to do or to abstain from doing something, with a view to obtaining the assent of the other party or parties to the doing or not doing of that something, he is said to make a **proposal**. If the party or the parties to whom the proposal is made signify assent to the proposal, the proposal, or the offer, as it may be termed, is deemed to be accepted. When a proposal is accepted, it gives rise to what is known as a **promise**. The person making the proposal is called the **proposer** or **promisor** ; the acceptor of the proposal is called the **promisee**. The promise is also known as an agreement. If the agreement is enforceable at law, it is called a contract ; but if it is not enforceable at law, it is termed a **void agreement**. [Sec. 2]

**The essentials of a valid agreement are :—**

- (1) A lawful offer accepted unconditionally ;
- (2) A lawful object ; the agreement must not be opposed to public policy or good morals or the interests of the State ;
- (3) The capacity at law to enter into a valid contract. [The parties to the agreement must have the capacity to contract] ;
- (4) Consent of the parties to the agreement. [The parties must have understood the same thing in the same sense ; in other words, there must not be any mistake common to the minds of the parties to the agreement] ;
- (5) Freedom from vagueness. [There should not be such vagueness as would render the agreement unascertainable and therefore void] ;
- (6) Possibility of performance [The agreement should not be to do an impossible thing] *Lex non cogit ad impossibilia*; *impossibilium nulla obligatio* (The law does not compel what is impossible ; impossibility nullifies an existing obligation) ;

- (7) Writing where required by some Act or Law. [Where writing is required, the agreement must be in writing ; and where both writing and registration are required, the agreement must be in writing and registered] and
- (8) Presence of consideration. [The agreement must, as a rule, be for some consideration ; it should not be out of a desire to do something voluntarily, though there are cases in which consideration is not necessary].

[Sec. 10 of the Indian Contract Act.]

## CHAPTER IV

### CONSIDERATION

#### Meaning of Consideration

When one person does something, or agrees to do something, or abstains from doing something, or agrees to abstain from doing something, or **has done** or **has abstained** from doing something, for another person **at his desire**, the act or abstinence is called the consideration for the promise made by the other person. (Sec. 2 Indian Contract Act.) Thus if at the desire of A, B agrees to paint a picture for him at an agreed remuneration, the painting of the picture would be regarded as consideration moving from B, and the remuneration offered by A to B would be regarded as consideration moving from A. [Sec. 2 of the Indian Contract Act.]

According to the English Law, consideration can move from the promisee but not from any other person. But under the Indian law, it may move from the promisee **or any other person**. (Chinnaya Rau v. Ramaya, 1881, 4 Mad. 137; Samuel v. Ananthanatha, 1883, 6 Mad. 351.) [Sec. 2 of the Ind. Contract Act.]

#### Types of Consideration

Consideration may be classified into (1) past consideration, (2) present consideration, or executed consideration, and (3) future consideration or executory consideration.

When a person promises to compensate another or to do something for another in return for what the latter had done for the promisor in the past or before the making of the promise, the promise is said to be for **past consideration**, i.e., consideration which took place in the past. Thus, if at the desire of A, an infant, B had supported the infant and brought him up, and A on attaining majority and earning a living made a promise to B to compensate B for what B had done for A in the past, this is a past consideration for which the promise is made. Under the English law past consideration is no consideration; so the illustration cited here would, so far as the enforcement of the promise goes, show that the promise is not enforceable in England. But under the Indian law, past consideration is good consideration because of the use of the words "**has done** or **abstained** from doing" in the definition of consideration. It is for this reason that such a promise, as in our illustration, would be enforceable in India. (Sindha v. Abraham, 1895, 20 Bom. 755; see also Lampleigh v. Braithwaite, 1 Sm. L. C. 141, regarding the law on the point in England).



**1 Present or executed** consideration means consideration which takes place simultaneously with the promise. *e.g.*, A goes to a book-seller and buys a book, and pays the price on the spot. The consideration, in this case, is present or executed, because it is performed there and then by both the parties. A delivers the goods to B, and B pays him the price for the goods delivered. In this case also the consideration is executed or present.

**Future or executory** consideration means consideration which is to take place at a future date, as when there is an agreement to deliver goods or to render services at a future date or after a stipulated period. Under the Indian Law present or executed consideration as well as executory or future consideration are valid ; and so also in England. But as regards past consideration it is valid in Indian law, but not under the English law.

## **ANALYSIS OF THE CLAUSES IN THE DEFINITION OF CONSIDERATION AS GIVEN IN SECTION 2 OF THE INDIAN CONTRACT ACT**

### **(A) Desire of the Promisor Essential**

In order that there may be consideration at law, it is essential that what is done must have been done at the desire of the promisor, and not voluntarily. A sees B's house on fire. A **voluntarily** rushes to B's help. There is no consideration here, but a voluntary act. But if A goes to B's help at B's desire, there is good consideration, because A did not wish to do the act gratuitously.

In *Durga Prasad v. Baldeo*, 1881, 3 All. 221, it was held that where the defendants had agreed to pay to the plaintiff a commission on articles sold by them in a market where they had shops, in consideration of the plaintiff having spent money in improving the condition of the market, but as a matter of fact, the plaintiff had acted at the desire really of the Collector of the district and not at the desire of the shop-keepers (the defendants) the plaintiff could not recover the agreed commission from the defendants. What the plaintiff had done ~~was done~~ really not at the desire of the defendants but at the desire of the Collector of the district, and therefore, no consideration moved from him in favour of the defendants, who consequently were not liable to him.

### **(B) Consideration may move from the promisee or any other person**

Under the English law consideration cannot lawfully move from a person other than the promisee. If it moves from a person other than the promisee, the agreement is not enforceable by that other person. But under the Indian law consideration can move from the promisee or any other person. Where L granted an estate to C

directing her to make thereout an annual payment to his (L's) brother, and C by an agreement made with the brother of L agreed to carryout L's instructions under the bequest to her, it was held by the Court that though on the agreement between C and L's brother no consideration moved from L's brother, yet it moved from L and that was sufficient, because consideration in India need not move from the promisee, but can move from any other person. In this case consideration moved from L. (*Chinnaya Rau v. Ramaya*, 1881, 4 Mad. 137; see also *Samuel v. Ananthanatha*, 1883, 6 Mad. 351). If in this case cited and illustrated, there had been no agreement between C. and L's brother, L's brother could not have sued C, because then L's brother would not have been a party to the contract. Both under the Indian and the English Laws, the person who is not a party to a contract, cannot, as a rule, sue upon it.

### (C) Past Consideration

When a promise is made by one person in favour of another for something done by the latter in the past or something abstained from being done in the past, the consideration is said to be past consideration. If an infant is maintained during his minority by a person at the desire of the infant, and upon attaining majority, the infant makes a promise to repay the other person for what was done for him in the past, it would be a case of past consideration recognisable only under the Indian law but not under the English Law. (*Sindha v. Abraham*, 1895, 20 Bom. 755).

### 24. Can a person who is not a party to a contract sue upon it ?

A person who is not a party to a contract cannot sue upon it though the contract is for his benefit. A at B's request may do, or agree to do, or agree to abstain from doing, something, for the benefit of another person, X, in consideration of a promise by B. But X the other party, being a stranger to the consideration and not being a party to the contract, cannot sue upon the contract. It would, of course, be otherwise if X were made a party to the contract, or if X was a beneficiary in an agreement to create a trust, or if X was a beneficiary under a settlement of a family dispute. [An assignee under a contract, *e.g.* of the benefit of an insurance policy, can sue though not a party to the contract.]

A stranger to the consideration who is not a party to a contract cannot sue upon the contract, except under the excepted cases, cited hereinafter. But before we turn to the exceptions it is necessary to examine the cases dealing with the general principle that the person who is not a party to the contract cannot sue upon it. In *Tweddle v. Atkinson*, 1. B. & S. 393, a leading English case on the point, it was held that if an agreement is entered into between the respective fathers of the parties to a marriage, that each of them

should pay a sum of money to the husband who shall have power to sue for such sum, and if afterwards the husband sues the executors of the wife's father upon the terms of the agreement, the action is not maintainable, in so far as the husband was not a party to the agreement. The plea of nearness of relationship of the contracting parties cannot be regarded as a good plea. *Dutton v. Pool*, an earlier case, is no longer good law. In *Tweddle v. Atkinson*, the case cited above, the father of the girl had promised, in consideration of the promise by the father of the boy, to pay a sum of money by way of dowry; it was because of that that the father of the boy could have enforced the promise against the father of the girl. The consideration moving from the father of the boy was that he also was giving a sum of money to the boy. Now supposing, the father of the boy had not agreed to give any sum of money to the boy, could he have enforced the promise? Under the English law he could not have enforced the promise, because no consideration moved from him; but under the Indian law, because consideration can move from any other party or person, the promise by the father of the girl to pay the dowry amount to the boy would be enforceable in a suit by the father of the boy; though no consideration moved from him, yet consideration has moved from his son. But the boy himself could not enforce such a promise whether under the Indian or under the English law, because he is not a party to the contract.

In the following cases a person who is not a party to a contract can sue upon it :—

- (1) A **beneficiary** under an agreement to create a trust can sue upon the agreement, though not a party to it, for the enforcement of it so as to get the trust actually executed for his benefit. Thus in *Khwaja Khan v. Husaini Begam*, 1910, 32 All. 410 (P.C.), it was held that where a Mohamedan lady sued her own father-in-law to recover arrears of allowance payable to her by the father-in-law under an agreement between him and her own father in consideration of her marriage, she could enforce the promise in her favour in so far as she was a beneficiary under the agreement to make a settlement in her favour, and she was claiming as beneficiary under such settlement. This Privy Council decision was followed by the Calcutta High Court in *Dutt v. Chunilal*, 1913, 41 Cal. 137. See also 1926, 53 Cal. 922; and *Jagadamba v. Bibhootibhooshan*, 1933, 60 Cal. 767.
- (2) An **assignee** under an assignment made by the parties, or by the operation of the law (*e.g.*, in the case of insolvency or death), can sue upon the contract for the

enforcement of its rights, title and interests. [But a mere nominee (*i.e.* the person for whose benefit another has insured his own life) cannot sue on the policy, because she is not an assignee. (*Krishna v. Pramila*, 1928, 55 Cal. 1315 ; see also 37 Bom 471.)]

- (3) A person who is entitled to something under a family settlement *e.g.* a settlement of doubtful rights and claims between members of a family or under a suit for maintenance by a female member of a family, can sue for the enforcement of his or her right under the settlement, though he or she was not a party to such settlement. (*Dan Kuer v. Sarla Devi*, A.I.R. 1947 P. C. 8 ; *Ahmed v. Riyasut*, 1935 All. (A.I.R.) 862 ; *Arumugaswami v. Kumara*, 1929, 56 Mad. L. J. 295.)
- (4) Whenever the promisor is by his own conduct estopped from denying his liability to perform the promise, the person who is not a party to the contract can sue upon it to make the promisor liable. (*Surjan v. Nanat*, A.I.R. 1940 Lah. 471.)

### 'Motive' and 'Consideration'

Every act done by a person implies a motive, because man is a purposive being. But every motive is not necessarily a consideration. On the other hand, all 'consideration' falls within the term 'motive'. Motive includes something which is of a non-commercial type, as something which is the result of a pecuniary interest. A person may do an act for another out of charity and voluntarily, *e.g.*, the supporting of an infant merely out of kindness, or the rushing to save a house on fire without intending to get any compensation for the same, or to save a man in danger of being drowned just for the sake of rendering help ; in such a case he is doing it out of a motive, *viz.*, that of doing good but not for any legal consideration. On the other hand, a person may do the thing for another because he has been requested to do so. In that case there is consideration, the object of getting of a reward or compensation.

### Consideration—its necessity and adequacy [Sec. 25]

Though not, as a rule, under the Roman Dutch Law, yet under the English and the Indian laws, consideration is, as a rule, necessary for the validity of an agreement. In India consideration is necessary if an agreement is to be valid, except in certain cases. *Ex nudo pacto non oritur actio* (no cause of action arises out of a bare pact or promise). But the following are the cases in which an agreement without consideration is valid :—

- (1) An agreement in **writing**, and **registered** under the law for the time being in force, made **out of natural love and affection**, between parties in **near** relation to one another or each other, as the case may be, *e.g.*, an agreement between a father and his son whereby the father promises to give, out of natural love and affection, to the son, a sum of money or to do something for him or to abstain from doing something; no consideration is required in such a case. Remote relationship would not do. *Jafar Ali v. Ahmed Ali*, 1868, 5 B. H. C. 37. [Sec. 25 (1)]
- (2) A promise by one person to another to compensate wholly or in part a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do. If A promises to give B a sum of money for having voluntarily found his lost purse or a lost dog, the promise is valid though without consideration. Likewise if A promises to compensate B for B's act of having supported A's infant son whom A was legally compellable to support, but could not support, and who was supported by B, the promise is valid though without consideration. [Sec. 25 (2)]
- (3) A **promise in writing, signed** by the debtor, or by his agent authorised to sign it, to pay wholly or in part an **ascertained** or **liquidated** amount which is otherwise barred by limitation. There must be a **promise** to pay, and not a mere acknowledgment of indebtedness. There need not be any accepted proposal reduced to writing. (*Appa Rao v. Suryaprakasa*, 1900, 23 Mad. 94.) And the promise in writing need not specifically refer to the prior debt. (*Abdullakin v. Maung D*, 1929, 7 Rang. 292; *Lal v. Kallauns*, 1885, 11 Cal. 519.) It is not necessary that the debtor should, while making the promise, know that the debt was time barred. (18 Cal. L. J. 329.) Even a conditional promise would do. [1912, 16 Cal. W. N. 634. Sec. 25 (3)]

Unless there is a **promise** to pay an ascertained sum, Sec. 25 (3) would not apply. (*Prasad v. Dayal*, 1901, 23 All. 502; and 57 Cal 394). A promise to pay what is due after taking accounts is not promise to pay a debt within the meaning of Sec. 25 (3). *Chowks v. Chowksi*, 8 Bom. 194; *Ramji v. Dharma*, 1882, Bom. 683; 8 Bom 405; 19 Cal. L. J. 263; 23 Mad. 94; 49 All. 496. "Debt" in Sec. 25 (3) means an ascertained or liquidated amount. (*Doraisami v. Vaithilinga*, 1917, 40 Mad. 31.)

[See Sec. 25 of the Indian Contract Act.]

Under Section 185 of the Indian Contract Act, no consideration is necessary to create an agency. This transaction is valid even without any consideration.

A *commodatum*, *i.e.* the lending of a commodity free (without any charges) to a person for use by him is also a bailment. (Per Holt L. J. in *Coggs v. Bernard*, 1704, 1 Sm. L. C.—12th edn. 191; also section 150 of the Indian Contract Act.)

Though consideration need not be adequate to the promise, it should be **real**, *i.e.* it must have some value in the eye of the law. It must not be illusory or sham, *e.g.*, to discover treasure by magic. Further if a person is **already bound** to do an act under the law, and if he does that act for which a reward or compensation is offered subsequently, such reward or compensation cannot be recovered at law because of want of consideration. (*Durga Prasad v. Baldeo*, 1881, 3 All. 221.) An agreement made **subsequent** to the briefing of a pleader whereby he is offered a further remuneration or reward in the event of success is void, because the pleader is already bound to do his best; there is no fresh consideration. (*Ramchandra v. Kalu* 1877, 2 Bom. 362.) But if it was so agreed from the beginning, it is valid. (*Shivram v. Arjun*, 5 Bom. 258.)

Though consideration need not be adequate to the promise, yet its inadequacy, if very great, would raise doubt in the mind of the judge trying the case, if the other party alleges that his consent to the agreement was obtained in an unfree manner. A may agree to sell his property worth Rs. 500 for Rs. 500 or Rs. 50; the consideration though inadequate is valid in such a case. But the court would look upon the transaction with an eye of suspicion, because the transaction on the very face of it is highly **unconscionable** or **unfair**. In the case of an unconscionable transaction appearing as such on the very face of it, the Court will set it aside unless the other party satisfies the Court that it is not an unconscionable transaction or that the consent was not unfree.

## CHAPTER V

### PROPOSAL (OFFER) AND ACCEPTANCE

For the validity of a contract there must be an *aggregatio mentium* (a mental accord) between two or more persons. How an agreement can be arrived at has already been considered in Chapter III. This Chapter deals with the rules of law regarding offer and acceptance.

When one person **intending to create a legal (as opposed to a mere social) obligation, communicates** to another his willingness to do or not to do a thing, **with a view to obtaining the assent of that other person** towards the act or abstinence, the person making the communication is said to be making a **proposal**. [Sec. 2] **There must be the intention to create legal rights and obligations** ; otherwise there would not be any legal proposal. Thus if A invites X to a dinner party, and X having promised does not turn up at the dinner party A cannot sue X for a breach of contract, for there was no intention to create any legal obligation. Where a cricket club invites (even from a fairly far-off field) an amateur cricketer to play in a cricket match, and though he has accepted the invitation, gone a great way travelling and incurring hotel expenses, and he is ultimately not allowed to play, can he recover damages for all the expenditure incurred by him? The answer is in the negative, because there was no intention to create binding legal relations or obligation. It was only a matter of a social understanding. Moreover the cricketer was an amateur. It must also be remembered that a mere statement of intention or a mere question would not amount to a proposal capable of being accepted by the other party so as to constitute a binding promise. A mere statement of intention is not a proposal. Thus if a shop-keeper displays in a show case an article with a label having : "Rs. 5", a person seeing the article and the label cannot get into the shop and compel the shop keeper to sell to him the article upon payment of the amount of five rupees, for what the shop-keeper did by so displaying the goods in his showcase was that he merely showed his intention to sell the article at the price given on the label. The person entering the shop and demanding the article for Rs. 5 is really the proposer, and it is for the shop-keeper to accept or reject the offer. In *Harvey v. Facey* (1893 A. C. 552). Harvey telegraphed to Facey asking the latter to inform him whether he would sell Whiteacre, and if so, at what price. Facey simply replied that the lowest price was £900, **but did not say that he was willing to sell**. Harvey telegraphed to Facey that he would buy the Whiteacre for £900. Facey did not send any answer to this telegram. Harvey then sued Facey. It was held that in so far as Facey never said that he would sell the Whiteacre he was not liable. The first

telegram sent by Harvey to Facey was merely a question. The answer to that telegram merely gave the price, but did not answer the question regarding whether Facey was willing to sell the White-acre. Harvey's second telegram was really an offer which it was for Facey to accept or reject. In so far as Facey did not send any further reply, Facey was deemed to have refused Harvey's offer. There was therefore no contract, and no suit could lie against Facey.

Where a father-in-law wrote to his would-be son-in-law, "..... with my large family, my daughter Eliza Mill.....will have a share of what I leave after the death of her mother", it was held that these words were a mere talk—a bare statement of intention. (*Farina v. Fickus*, 1900, 1 Ch. 331.)

A mere quotation of terms sent by a trader to an intending customer is not an offer (proposal) to the customer. It would be the customer making the offer, if any, which the trader sending the quotation could accept or reject. (*Mylappa v. Aga*, 1919, 37 Mad. L. J. 712 ; *Devidatt v. Shriram*, A. I. R. 1932 Bom. 291.) So also it has been held that a mere catalogue does not mean an offer or offers made. The prices given in a catalogue merely show an intention to sell at those prices. The trader is not bound to sell his goods at the price mentioned in the catalogue. (*Mylappa v. Aga*, 1919, 37 Mad. L. J. 712 ; *Durga Prasad v. Rulia Mal*, 1922, 4 Lah. L. J. 176.)

In the case of tenders invited, it is the person making the tender who is deemed to be the proposer ; the person inviting the tenders may accept any offer or reject it. Even the highest bidder is merely making an offer which it is for the person inviting the tenders to accept or reject ; but if the person inviting the tenders has undertaken to accept the offer made by the highest bidder, he would be bound to accept his offer. (*G. N. Rly. Co. v. Witham*, 1873, L. R. 9 C.P. 16 ; *Spencer v. Hardinge L. R.*, 5 C. P. 561.)

One Mr. A submitted a proposal form to an Insurance Company, wishing to insure his life with that company. The company "accepted" the proposal but declared that unless and until the first premium was paid no insurance would commence. After a while and **before the first premium was paid** the company having come to know that A was not keeping good health refused to abide by its so-called "acceptance". A sued the company. It was held that there was no agreement ; the so-called acceptance was merely a counter-proposal or an offer, and the company could withdraw its offer before it was accepted by A, *i.e.*, before the first premium was paid. (*Canning v. Farquhar*, 1886, 16 Q. B. D. 727.)

Where there are any special terms in a contract it is necessary that the same should be communicated to the proposee at the time



the proposal is made or before the proposee accepts the proposal and transmits or gives it so as to be out of his (proposee's) control or disposition.

If there are conditions attached to a contract or proposal the same have to be complied with. Where a person deposited luggage with a railway company and got a ticket on the face of which it was written that the ticket was issued and the luggage left "subject to the conditions on the other side" of the ticket, and on the other side was a condition that the company would not be responsible for loss of or injury to any package beyond the value of £5 unless extra payment was made, it was held by the Court that unless the required extra payment was made the company was not liable. The person who deposited the luggage had not read the conditions on the ticket, though he was aware of the fact that there were conditions on the other side of the ticket. It was held that the depositor of the luggage ought to have read the conditions of the proposal before accepting the proposal. (*Harris v. Great Western Railway Company*, 1876, 1 Q. B. D. 515.) But in another case—*Henderson v. Stevenson*, 1875, L. R. 2 H. L. Sc. 470, a passenger was held not bound by the conditions on the other side of the ticket, because there was nothing on the face of it (the ticket) to draw the passenger's notice to the conditions written on the other side (of the ticket). It was necessary that, if the conditions of the proposal were to be made binding on the acceptor, a reference to them ought to have been made on the face of the ticket.

When a railway ticket is accepted by the passenger, he accepts it subject to the conditions mentioned in it, if on the face of the ticket there be words to draw the attention of the passenger to those conditions. When the passenger shows his readiness to pay the price of the ticket he (the passenger) is inviting the offer from the booking clerk. It is the railway booking clerk who offers the ticket by issuing it subject to the conditions thereon. When the passenger actually pays the money and takes away the ticket the passenger is said to have accepted the offer.

Where a thing (like a deck chair) is defective the user or hirer of it can sue the bailor for the defect in the thing though the bailor had issued a ticket that the hirer or bailee shall not hold the bailor liable for any loss, damage or accident in the use of the thing. (*Chapleton v. Barry*, U.D.C. 1940, 1 K.B. 532.)

### Acceptance [Sec. 2 (b) ; Secs. 7 ; 8]

An **acceptance**, to be valid, must be **unconditional and absolute**. If A writes to X that he would buy X's 'Crystal Cottage' for Rs. 40,000 if X would sell it to him, and X replies that he would sell his 'Red House' for Rs. 40,000, there is no acceptance, for A wants

to buy the 'Crystal Cottage' whereas X is offering his 'Red House'; or if X replied saying that he would sell his 'Crystal Cottage' to A for Rs. 45,000, there would be no acceptance, but merely a counter proposal which A the original proposer might accept or reject.

Where a particular mode of acceptance is prescribed by the proposer, the proposee must follow the particular mode of acceptance; otherwise the acceptance would not be valid.

In *Carlill v. Carbolic Smoke Ball Co.*, 1893, 1 Q. B. 256, it was held that acceptance may be in writing or by word of mouth or by conduct. Where a company advertised that persons using its Carbolic Smoke Ball for a fortnight would become influenza-proof, and offered a reward of £100 to any person who after using it contracted influenza, and the plaintiff used a Carbolic Smoke Ball for the prescribed period of a fortnight, but still contracted influenza, it was held that the plaintiff could recover the reward of £100, in so far as there was an acceptance by conduct. The mode prescribed for acceptance was followed, and no further communication of acceptance was necessary. The argument that the Company was not informed by the plaintiff about the use of the smoke ball was not accepted by the Court which held that the following of the mode prescribed by the proposer was all that was needed.

Where a widow, who had maintained her niece since childhood and was deeply attached to her, invited the niece and her husband to stay with her at her residence and to settle on her an immovable property and the niece and her husband accepted the proposal by conduct, *i.e.*, by going to the aunt and staying with her till her (the aunt's) demise, it was held by the Privy Council that the niece was entitled to the property because she had accepted the aunt's offer by going to her residence and staying with her till her demise. (*Venkayamma Rao v. Appa Rao*, 1916, 39 Mad. 509.)

Where the proposal is made through the post and the acceptance is also made through the medium of the post office, it is sufficient that the letter of acceptance has been duly addressed and posted. Even if the letter of acceptance does not actually reach the proposer, the proposer is bound by the acceptance, for the proposer having made the post office the medium of communication—his agent, so to say,—a communication by the acceptor to the agent—the post office—is equivalent to a communication to the principal, the proposer. *Household Insurance Co. v. Grant*, 4 Ex. D. 216. But the letter **must have been accurately addressed**; if the address on the letter be incorrect, the acceptance would not bind the proposer (*Das v. The Off. Liquidator*, 1887, 9 All. 366), unless the proposer himself had given an incorrect address (*Townsend's Case*, 13 Eq. 148). The acceptor cannot carelessly give, or allow to be given, the letter of acceptance to a postman for posting; if due to such carelessness

on the part of the acceptor the letter does not reach the proposer, the latter would not be bound by the acceptance. It was so held in the case of the London and Northern Bank, 1900, 1 Ch. 220. It must also be remembered that the letter **must have been posted**, and there must be some good proof of such posting, *e.g.*, a certificate of posting issued by the post office concerned.

One Mr. Grant applied for shares of a company which accepted the applicant's proposal and allotted shares to him (Mr. Grant). But the letter of allotment posted by the Company did not actually reach Mr. Grant. It was held that Mr. Grant was liable as a shareholder though the letter was not received by him, because the letter was actually posted (and not merely given to somebody like a post-man to post.) [Household Fire Insurance Co. v. Grant, (4 Ex. D. 216)].

### Standing or Open Proposal

A proposal is said to be a **standing or open** proposal when it is kept open for acceptance during a certain period of time. Such a proposal can be accepted from time to time by the proposee **ordering out definite quantities**. If A agrees to supply corn to X upto a certain quantity and at a definite price for a period of time, say 3 years, and if X "accepts" A's proposal, there is no acceptance in law until X orders out a definite quantity. X can accept A's offer by ordering out the whole quantity or definite quantities of corn from A from time to time. (Bengal Coal Co. v. Wadia, 1900, 24 Bom. 97.) Before acceptance by X, A may withdraw his offer. (G. Latif V. Manilal, 1916, 18 Bom. L. R. 217.)

### Communication and Revocation of Proposal and Acceptance [Sec. 3]

A proposal or an acceptance may be communicated to the other party by anything which has the effect of communicating it. A may send a proposal or acceptance to X by word of mouth or by a letter or by conduct. There may be in some shop or on the Railway Station or elsewhere an automatic weight-recording machine with a slot in it. The person who wants to have his weight taken may put the required coin in the slot, and have his weight taken. If the machine does not work after the coin is put into the slot, there would be technically a breach of contract, for the person putting the coin is said to have accepted the offer by conduct—the offer (written on the machine) being: "Put an anna in the slot and get your weight".

### Revocation of Proposal

A proposal may be revoked at any time **before** its acceptance is put in a course of transmission to the proposer, so as to be out of the power of the acceptor, **but not afterwards**. [Sec. 5]

A proposes, by a letter sent by post, to sell his house to B. B accepts the proposal by a letter sent by post. A may revoke his proposal at any time **before or at the moment B posts his letter of acceptance, but not afterwards.** Once the letter is posted by B, A cannot revoke the proposal.

### Revocation of Acceptance

An acceptance may be revoked at any time **before** it comes to the **knowledge** of the proposer, **but not afterwards.** [Sec. 5]

A proposes to sell his land to X. He communicates with X who accepts the proposal by a letter. X then regrets having accepted the proposal. Can he revoke it? X can revoke the acceptance at any time before his letter of acceptance comes to the knowledge of the proposer A. Once A knows of the acceptance, X cannot revoke the acceptance. If X has sent a letter of acceptance, he can revoke the acceptance by some speedy means; he can send a telegram to A revoking the acceptance, and if the telegram is **read** by A **before he opens the letter and knows** of the acceptance, the telegram will constitute a good revocation. If the telegram and the letter both reach him at the same time, it would be a question of fact as to whether A read the telegram first or the letter first.

### When is a proposal revoked ?

If the proposer gives, in proper time, notice of revocation to the other party, the proposal is said to be revoked. [Sec. 6 (1)]

Where the proposer prescribes the time within which the proposal has to be accepted, if at all, the proposal is said to be revoked after the lapse of the time prescribed. If no time is so prescribed, the proposal is said to have been revoked after the lapse of a reasonable time. [Sec. 6 (2)]

A proposal is also revoked if the acceptor does not fulfill a condition precedent to acceptance. [Sec. 6 (3)]

A proposal is revoked by the death or insanity of the proposer, if that fact comes to the knowledge of the acceptor before acceptance. [In England the death of the proposer is enough to constitute a lapse of the offer.] If the proposee dies before acceptance the proposal is automatically terminated. (*Werner v. Humphreys*, 2 M. & G. 853. [Sec. 6 (4)])

## CHAPTER VI

### AGREEMENTS & LEGALITY OF OBJECT

The object of an agreement must be a lawful one and it must not be opposed to good morals or the interests of the State or public policy. [Sec. 23]

An agreement to do an illegal thing would undoubtedly be void. An agreement to fight a duel in this country is void. So also if a landlord knowingly lets out his premises for an unlawful or immoral purpose, he cannot recover any rent, for the agreement is void. *Ex turpi causa non oritur actio* (no cause of action arises out of what is illegal). [Sec. 23]

An agreement with an alien enemy is void, for such an agreement is opposed to the interests of the State, unless entered into with the fiat (permission) of the State.

Agreements which are against public policy are void. An agreement which is in restraint of trade or which is by way of wager is void ; so also is an agreement in restraint of marriage (except that of a minor) or in absolute restraint of judicial proceedings void, as being against public policy.

#### Agreements in Restraint of Trade [Sec. 27]

An agreement the object of which is to deprive a person of his right to exercise a lawful profession, occupation, trade or business of any kind is to that extent void.

The law does not give effect to an agreement which aims at taking away a person's lawful right to do a lawful business or trade or to exercise any lawful occupation. Under the English Law, if a restraint is reasonable and within reasonable local limits it is valid ; but the Indian Law does not recognize any restraint of trade whether absolute or partial. And even under the English Law as laid down in Nordenfelt's case (1894, A. C. 535), whether a restraint is valid or void is determined by considering whether or not it is meant for the just protection of the covenantor in whose favour it is imposed. If the restraint is reasonably necessary for such just protection it would be allowed ; otherwise, it would not be allowed. In India also the same test is applicable. The restraint must be a reasonable one, and there must be consideration to support it. Thus a covenant by Nordenfelt, the seller of his business with its goodwill to the Maxim Nordenfelt Gun Company, not to carry on, for a period of twenty-five years, the business of manufacturing of guns and ammunition of the type he had been manufacturing, was held valid as being for the just protection of the company.

**The cases in which restraint of trade is recognized by the Indian Law are :—**

(1) The seller of a business **with its goodwill** may validly agree with the buyer of the **goodwill** that as long as the buyer, or any person acquiring the goodwill from him, carries on **a like business** within the locality, he (the seller) shall not carry on a **similar business, within the agreed local limits and for the stipulated time.** (Vancouver Malt Ltd. v. Vancouver Breweries Ltd., 1934 A. C. 181.) **The restraint must be within reasonable local limits and must not be for too long a time.** As to whether a particular restraint is reasonable or otherwise is a question of fact and depends upon the **nature of the business and the extent of its customers.** (Shaikh Kalu v. Saran, 13 Cal. W. N. 388, 394.) The larger the business and the wider the extent of its customers the wider might be the restraint reasonably and lawfully imposed. Whether **goodwill** really exists or not is a question of fact. A goodwill really must exist if it is to be bought. 1912, 1 K. B. 539, 559.

When the restraint is too wide to be allowed, *e.g.* the person concerned is restrained from doing a similar business **“anywhere else”**, (*i.e.* meaning thereby **anywhere in the world**), the agreement is void ; and the Court cannot construe it in a limited sense making the restraint applicable to the locality concerned, for the Court cannot make for the parties a contract which they themselves never made or even intended. But where a person, who was doing a business with a goodwill in a particular commodity or in a particular manufacture, agrees with the buyer of that business (who buys it with its goodwill) not to carry on business (within reasonable local limits and for a reasonable period of time) in that commodity or manufacture and also in a commodity or manufacture of a **different** type, the latter restraint cannot be enforced at law, but the former one can validly be enforced. Thus where a vendor of a business in imitation jewellery agreed with its buyer not to carry on the business either of imitation jewellery or even real jewellery, it was held that the Court could enforce the restraint regarding the imitation jewellery business but not the real jewellery business. (Goldsoll v. Goldman, 1915, 1 Ch. 292.)

(2) If a partner agrees with his partners, or if partners agree between or among themselves, that **as long as the partner remains a partner**, he, or the partners, as the case may be, shall not carry on any other business, the agreement shall be regarded as valid.

(3) A partner may agree with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm **within a specified period or within specified local limits.** Such agreement would be valid if the restriction imposed be reasonable.

(4) Partners may, while or in anticipation of dissolving the firm, agree that all or some of them shall not carry on a business

similar to that carried on by the firm, **within a specified period or within specified local limits.** Such an agreement would be valid if the restrictions imposed are reasonable. As to what is a reasonable restraint will depend upon the nature of the business, its reputation and the extent of its customers.

### **Agreement regulating the mode of conduct of a business to be distinguished from agreement in restraint of trade**

An agreement merely restraining the mode in which a business may be carried on is not in restraint of trade. Thus "pools" and "trade combinations", which are meant to **regulate** any kind of business and to promote the welfare of the persons engaged in that business or to prevent unhealthy competition, are not in restraint of trade, and are therefore valid. Thus an agreement between ice manufacturers not to sell ice below a particular minimum price was held valid. (*Fraser & Co. v. Bombay Ice Co.*, 1905, 29 Bom. 107.) So also an agreement to sell goods in a particular market, and not elsewhere, was held valid. (9 W. R. 212.) So also where a merchant agreed to buy the whole quantity of a particular class of goods manufactured by a manufacturer and the manufacturer agreed to sell exclusively to him all the goods of that particular type, it was held that the stipulation to sell to the merchant and not to any one else was enforceable at law ; it was not in restraint of trade. (*Mackenzie v. Striramiah*, 1892, 15 Mad. 79 ; *Suba v. Haji*, 1903, 26 Mad. 168.)

Agreements, however, which seek to create monopolies and to raise the prices to an extent beyond toleration, can be held void as unreasonably in restraint of trade. (*Attorney General of Australia v. Adelaide S. S. Co.*, 1913, A. C. 796.)

### **Negative Stipulations in Contracts of Service, and Restraint of Trade**

A, a singer, agrees to serve at B's theatre for a period of three years. She also agrees not to sing at any other rival theatre in the locality concerned during this period of three years of her service with B. If A wrongfully commits a breach of her contract and serves at any rival theatre, B can get an order of the Court restraining her from singing at any rival theatre. Though B can get such an order (injunction), the Court cannot order specific performance of the contract, *i.e.*, the Court cannot order A to sing at B's theatre, for A cannot be compelled to do something which is wholly dependent upon volition. The negative agreement can be enforced if reasonable. If the negative covenant says that A, the singer, shall not do **any other work** (during the period of three years of service with B) elsewhere, the negative covenant would not be in just protection of the rights of the aggrieved party, but would be an undue and unwarranted restraint of trade. The law on this point is well given in *Pragji v. Pranjiwan*, 5 Bom. L. R. 878 ;

and in *Charlesworth v. Macdonald*, 1899, 23 Bom. 103 ; and in *Deshpande v. Arvind Mills*, 48 Bom. L. R. 90.

An agreement, which seeks to restrain the employee from doing his lawful business or trade or carrying on his lawful occupation **after the period of service with his employer is over or lawfully determined** is void, because it is in restraint of trade ; such an agreement is no longer required for the protection of the employer after the period of employment is over. (*Oakes Co. v. Jackson*, 1, Mad. 134 ; and *Brahmaputra Tea Co. v. Scarth*, 11 Cal. 545 are the cases which lay down this proposition of law.) So an agreement not to grow tea within forty miles compass for five years **even after** the termination of a contract of service was held invalid. (*Brahmaputra Tea Co. v. Scarth*, 11 Cal. 545).

In *Charlesworth v. Macdonald*, 1899, 23 Bom. 103, the facts and ruling were :—

B, a physician practising at Zanzibar, took A as his assistant for three years during which A could not practise of his own in Zanzibar. At the end of a year from the date of his agreement with B, A left B and began his own independent practice. Farran, C. J. held that as the restraint was operative only during the period of three years of A's service with his employer B (and did not extend to any period beyond or after those three years) the agreement was for the reasonable protection of the covenantee (B) and that B could therefore have an injunction against A restraining him from carrying on with his own independent practice till the three years got over.

## AGREEMENTS BY WAY OF WAGER. [Sec. 30]

### What is an agreement by way of wager ?

An agreement is said to be by way of **wager** when the parties to it do not mean to do any business, **but simply wish to abide by the results of chance**. The essence of a wagering agreement is that one of the parties must lose and the other must gain. All agreements by way of wager are void. No suit can be brought to recover anything won on any wagering agreement ; even a stakeholder entrusted to keep money, prize or property for the benefit of the winner on a wager, cannot be sued at law to return the same to the winner. But it has been held that he can be sued by the depositor for recovering of the amount of the deposit if demanded before the money is paid over to the winner. *Maung Po v. Maung Aung*, 3 Rang, 543. But not so in Bombay, because of the local Act, declaring wager void and illegal. [Sec. 30]

There is exception in favour of subscriptions or contributions or agreements to subscribe or contribute for plate or sum of money or prize of the value or amount of Rs. 500 or upwards for the benefit



of the winner or winners of any horse race. Games other than horse races are not exempted, so that the same may be wagering and thus void.

A crossword competition, however, cannot, in so far as it involves, for a successful solution, a considerable amount of skill, be declared a wager. So also it seems that in a game of cards pluck is of as much importance as luck.

An agreement to purchase a ticket in a lottery (even an authorised lottery) is void. (*Tata v. Lance*, 42 Bom. 676.) But a chit fund is not a lottery. (*Narayan v. Vellachami*, 50 Mad. 696.)

### **Contracts of Insurance not by way of Wager**

In so far as there is what is known as the **insurable interest** (the interest possessed by the insured in the life assured or the subject-matter of the insurance) in every contract of insurance, and in so far as there is the bona fide intention to do business, an insurance contract is not in the nature of a wager. A contract of insurance is a good contingent or conditional contract, *i.e.*, a contract in which the promisor is to pay a sum of money to or compensate the insured if a specified named contingency occurs. A contract of life assurance is a contract whereby on the happening of a certain named event, *e.g.*, death or survival till a certain age, the assurer has to pay a sum of money to the assured. In a contract of fire or marine insurance, the insurer agrees to indemnify the insured against the loss suffered by him, the contract being a good conditional contract or a contract of indemnity.

### **Wagers distinguished from Speculative Transactions**

Gambling transactions are void as wagers; but speculative transactions are not necessarily wagers, and are, as a rule, valid. (*Todd v. Lakhmidas*, 16 Bom. 441.) Thus “ready transactions” and “forward” or “vaida” transactions are valid in law.

### **Teji Mandi Transactions**

A teji mandi transaction is a transaction in which one of the parties is given a double option of either buying from or selling to the other party goods of a specified type and of a specified quality and quantity at a future date and at a price fixed at the time of entering into the transaction. Teji mandi transactions are like the “put and call” transactions of the European Exchanges.

Are such transactions void? A teji mandi transaction is not a wager, **if the true intention of the parties is to do and mean business** (*Manubhai v. Keshavji*, 24 Bom. L. R. 60); but if the parties **merely mean to abide by the results of chance, and if without intending to give or take any delivery of goods they intend to pay the differences**, they are said to enter into a transaction which may be described as

a wager. In this connection the leading Privy Council case of *Sobhagmal v. Mukundchand*, 51 Bom. 1, may be noted with advantage. The Court can find out the true intent of the parties by diving deep into the facts. (*Re Gieve*, 1899, 1 Q. B. 794; *Sobhagmal v. Mukundchand*, 51 Bom. 1.)

In Bombay, by virtue of Act XXV of 1939, options in cotton are prohibited and declared void. Sec. 4 of that Act declares that all options in cotton entered into after the date on which the Act came into force are void. But **cross transactions**, i.e., forward transactions of sale and purchase which sometimes balance each other when the settlement day comes, are valid, because of the bona fide intent to do business, even though no delivery may actually have taken place. See *Sassoon v. Tokersey*, 28 Bom. 616.

### Can a Katcha Adatia enter into a Wager ?

Before the question can be answered it becomes necessary to consider the meaning of the expressions “Katcha Adatia” and “Pakka Adatia”. A “Katcha Adatia” is a person who on behalf of his principal, the upcountry constituent, agrees to try and find out a customer who would sell to or purchase from his principal. A “Katcha Adatia” does not guarantee to his principal the performance of the contract. If he does not succeed in finding a customer or seller, he is not liable to his principal. But if a Katcha Adatia deals with another Adatia (shroff) he would be liable to the other Adatia on the contract he enters into with the other Adatia. Likewise is the other Adatia liable to him for non-performance of the contract between them. A Pakka Adatia is a person who **undertakes** to find a buyer or a seller, as the case may be, for another person, his upcountry constituent. The relation between the Pakka Adatia and the constituent (the other party) is one of principal and principal. (See *Bhagwandas v. Burjorji*, 45 I. A. 29.) A Pakka Adatia is liable if he does not succeed in finding out the customer for the party for whom he is acting. (*Bhagwandas v. Kanji*, 1906, 30 Bom. 50; also 45 Bom. 386.) In consideration of the guarantee given by him to his constituent he (the Pakka Adatia) is given an extra remuneration.

As between a Katcha Adatia and his constituent there cannot be dealings by way of wager, as the relation between a Katcha Adatia and his constituent is that of agent and principal, and as an agent is only a scribe for the principal and acts for him. But as between a Pakka Adatia and his constituent there may be dealings by way of wager, as the relation between them is that of principal and principal, two **independent** persons. (*Sobhagmal v. Mukundchand*, 51, Bom. 1.)

### Wager is void. Is it illegal also ?

Under the Contract Act a wager is void but not illegal, though under local Acts, e.g., in Bombay, a wager is declared illegal also. In places, however, where a wager is not declared illegal, it is void

being against public policy, but not illegal, and where it is void without being illegal, **collateral transactions** are not void. (*Mitchell v. Tennent*, 52 Cal. 677 ; *Banvard v. Moolla*, 7 Rang. 263.) Thus where a person, who has lost on a wager, nevertheless wishes to pay to the winner what he had promised, borrows money for the payment of that amount, the moneylender can sue the borrower for the recovery of the loan money, unless (as in Bombay) a local Act renders a wager void and illegal, and thus renders collateral transactions also void. (*Beni Das v. Kaunsal*, 22 All. 452.) See also *Read v. Anderson*, (13 Q. B. D. 779). A broker can recover his brokerage even in a wagering transaction procured due to his efforts, because collateral transactions are not void (*Jagat Narain v. Shri Krishna*, 33 All. 219) ; but not so in Bombay where a wager is not only void but illegal also.

### **Agreements in Total Restraint of Judicial Proceedings [Sec. 28]**

Agreements in **total** restraint of judicial proceedings are void, as being opposed to public policy. (*Ramghulam v. Janki Rai*, 7 All. 124 ; *Coringa Oil Co. v. Koegler*, 1 Cal. 466.) But an agreement by which a party is only partially restrained is not void. Thus where parties to an agreement agree that in case of any dispute, the suit may be brought at a particular place only would not be void, if the Court at that place has the jurisdiction to try the suit. See also *Marittima Italiana v. Burjor*, 54 Bom. 278, 283.

A contract by which two or more persons agree that any dispute between them with regard to some specified subject shall be referred to **arbitration** and not to a Court of Law is valid. In such a case a suit cannot be brought in a Court of Law with regard to the dispute regarding the specified subject. If any such suit is brought, the contract in restraint of judicial proceedings can be pleaded as a complete bar to the suit. This, then, is one of the exceptions to the rule that an agreement in restraint of judicial proceedings is void.

Another exception to the rule is that any contract in writing, by which two or more persons agree to refer to **arbitration** any question between them which has already arisen or affect any provision of any law in force as to references to arbitration, is not void.

[An agreement not to appeal against the decision of the trying Court is not void. (*Munshi Amir Ali v. Indrajit*, 9 B.L. R. 460.)]

A stipulation, whereby an employee of a tramway company, was to abide by the decision of the manager of the company as regards wages and deposit if he broke any of the rules of the company, was held valid. (*Aghore Nauth v. Calcutta Tramway Company*, 11 Cal. 232.) See also 9 Bom. 183, 197. A stipulation that disputes will be heard in the Court at a particular agreed place alone, and not elsewhere, has been held valid. (49 Mad. L. J. 189 ; A. I. R. 1931, Cal. 279.) An agreement not to go in appeal, in consideration of

time being given for satisfaction of the Court's decree is valid. (1 All. 267 ; 8 Cal. 455.)

### Agreements in Restraint of Marriage [Sec. 26]

An agreement in restraint of the marriage of any person other than a minor, is void, as being opposed to public policy. So also is a marriage brocage agreement void because the law considers it to be against public policy.

A **marriage brocage** agreement is an agreement between a person known as marriage broker (one who can procure a match) and his or her client who has engaged the broker (to introduce him to the other party for matrimony) whereby the broker is promised some reward or money if the engagement is successfully brought about. The law says that the parties should be left free to make their own choice and that marriage brokers often procure undesirable engagements by false representations. Therefore their agreements are void as being against public policy. But that should not be so, because marriage brokers also render useful service.

### Maintenance and Champerty

When a person agrees to help or promote litigation in which he is not himself interested, his agreement is called **maintenance**. (Denn v. Curzon, 1911, 27 T. L. R. 457).

When a party to an agreement promises to help the other party (to the agreement) to recover property by bringing a suit, in return for a share (to him the helper) in the property so recovered (if recovered by the suit), the agreement is called **champerty**. (Ravji v. Krishnarao, 2 Bom. 273 ; Sen's case, 12 M. I. A. 375.)

In England, according to the law there, if a person helps another, out of a **wholly charitable motive**, and the cause of action is not a frivolous or vexatious one, the agreement whereby he, having no personal interest in the suit, helps another, is not void. It is a perfectly valid agreement enforceable at law, though it is a maintenance, because the object is **wholly charitable**. (Harris v. Brisco, 71 Q. B. 540.) But a champerty is void because the helper is promised a slice in the gains (if any) of the litigation, and one cannot call such a motive of the helper a charitable one. Thus if a lawyer agrees with his client to help in the litigation, and the client in turn agrees to give him a share in the decretal amount, the agreement is void as being champerty. (Rees v. Bernardy, 1896, 2 Ch. 444.)

Where the helper is not given any share in the gains of the litigation or the decretal amount, but is given only the right to receive the costs which the Court may award to the party helped by him, that is perfectly in consonance with the charitable motive, and cannot be regarded as champerty. It is not void, then, because it stands to reason that the helper having given the costs of the litigation, should in the event of success of the suit, be entitled to the costs actually awarded in the case.

In India, the helper, however, can validly stipulate for a slice in the gains of the litigation. He need not have any charitable motive inspiring the help in the litigation. In the absence of an unconscionable dealing or moral turpitude, the helper is entitled to the stipulated share of the litigation. (*Ramkoomar v. Mukerji*, 4 I. A. 23 ; *Raghunath v. Nilkanth*, 20 Cal. 843 ; 20 I. A. 112 ; also 35 Cal. 420 ; *Venkata v. Poosapati*, 48 Mad. 312.)

According to the Privy Council case (*Ram Koomar v. Mukerji*, 4 I. A. 23), the test is whether the transaction has been bona fide entered into or whether it is only to have revenge against somebody or to speculate only in litigation, hoping to have a share in the gains of it, though the case is absolutely hopeless, false or frivolous. If it is of the latter type, the transaction is void ; but if the idea really is to give support to a litigation (without any evil or vexatious or frivolous motive) the Court will not hold the transaction void simply because the helper is to have a share in the gains of the litigation. See also *Fischer v. Kamala*, 1860, 8 M. I. A. 170, 187. And it has been held in *Baldeo v. Harbans*, 1911, 33 All. 626, and in *Indar Singh v. Munshi*, 1920, 1 Lah. 124, that it is the duty of the Court to find out, as far as possible, what the nature of the transaction is—whether the litigation was inspired by a malicious motive or a frivolous or gambling purpose or whether it was a reasonably proper litigation.

### **Agreements for procuring, or traffic, in public offices [Sec. 23]**

An agreement the purpose of which is to procure for the promisee a public office or post or to assign the salary of such post is contrary to public policy, and is therefore void. (*Parsons v. Thomson*, 1 H. G. Bl. 322 ; *Saminatha v. Muthusami*, 1907, 30 Mad. 530.)

An agreement to sell a religious office, *e.g.* that of a religious trustee, a shebait or a mutawalli, is void. (*Raja Vurmah v. Ravi Vurmah*, 1876, 1 Mad. 235 ; *Gnanasambanda v. Velu Pandaram*, 1900 23 Mad. 271; *Wahid v. Ashruff*, 1882, 8 Cal. 732.) But an agreement between office holders in a temple to share the offerings made by pilgrims is valid, as it is not opposed to public policy. (*Kallu v. Rajinder*, 1922, 20 All. L. J. 807.)

### **Agreements creating interest opposed to duty [Sec. 23]**

An agreement which tends to create an interest opposed to duty is void. Thus where a purchase is made in contravention of a statutory enactment or order, *e.g.*, an agreement by a police officer to buy property is void, being contrary to duty, *i.e.*, being opposed to the prohibition under the Bombay District Police Act. (*Sundrabai v. Manohar*, 1933, 35 Bom. L. R. 404.) So also an agreement whereby an agent attempts to make a secret gain, is void, being opposed to the agent's fiduciary duty towards his principal. (*Manikka v. Paria*, 1936, A. I. R. Mad. 541.)

An agreement between a lawyer and his client whereby the lawyer is promised an additional fee or a reward in the event of success, is void, as being opposed to duty, for the lawyer was already, when the brief was delivered to him or the case entrusted to him, in duty bound to do his best for his client. If the promise to give the reward or additional fee was made **after** the case had been entrusted to the lawyer the promise is bad being opposed to duty. (Ramchandra v. Kalu, 2 Bom. 362). But if **at the very time** the brief was delivered or the case entrusted to the pleader the pleader was promised an additional fee or reward in the event of success the agreement to give the reward or the additional remuneration cannot be regarded as opposed to duty and the same is valid. (Shivram v. Arjun, 1881, 5 Bom. 258.)

### Agreements with illegal or immoral consideration void [Sec. 23]

An agreement contrary to the policy of the law, or in which the consideration is immoral or opposed to public policy, is void. If it is contrary to law it is **illegal** also. If it is illegal then not only is the main transaction void and illegal, but all collateral transactions also are void. But if it is void only without being illegal, then whereas the main transaction is void, the collateral transactions, if any, are valid.

If an act or transaction is not prohibited by the law of the land, then a mere departmental prohibition or restriction does not render void an agreement, entered into contrary to such restriction or prohibition. Thus breaches of rules under the Ferries and Tolls Acts do not make the agreement void, though the person or persons guilty of the breach can be dealt with for breach of departmental discipline. (Jai Narain v. Sultan, 1902, Punj. Rec. No. 96 ; Abdulla v. Mamood, 26 Mad. 156 ; Bhikanbhai v. Hiralal, 24 Bom. 622.) On the other hand, restrictions under the Opium and Abkari Acts are not merely departmental restrictions; they are restrictions under the law of the land, and agreements in breach of such restrictions are void. (19 Bom. 626 ; 26 Mad. 430 ; 31 Cal. 798 ; 10 All. 577.)

An agreement the consideration in which is immoral or fraudulent cannot be enforced at law. *Ex dolo malo non oritur actio* (No right of action can arise out of what is **fraudulent**). Similarly *Ex turpi causa non oritur actio*, i.e. no right of action can arise out of what is **immoral**.

## CHAPTER VII

### CAPACITY TO CONTRACT

The parties to an agreement must be **capable at law** of entering into valid contract.

Minors, lunatics and alien enemies cannot, as a rule, enter into valid contract. Corporations can validly contract only to the extent allowed by their charter or deed or memorandum of incorporation.

An agreement with an alien enemy is void, unless it was entered into with the fiat (sanction) of the Central Government.

### MINOR'S AGREEMENTS [Sec. 11]

#### Who is a minor ?

A person who is of the age of majority, **according to the law to which he is subject**, has the capacity to enter into a contract ; but any person who is not of the age of majority, **according to the law to which he is subject**, is termed a minor. Under the Indian Majority Act, a person becomes a major on the completion of 18 years of his or her age ; where the Court of Wards supervises the property of a person or where a guardian is appointed of a minor's property or person, the age of majority is deemed to be the completion of 21 years of one's age. Ordinarily then a person is said to be a major on the completion of 21 years of his or her age ; till then he is regarded as a minor. (In England any person who has not completed 21 years of his or her age is an infant.)

#### The question of enforceability of a minor's agreement

In India, a minor's agreement is absolutely void, for a minor has no capacity to contract. Not having mature judgment a minor cannot bind himself by entering into an agreement with another. In the leading case of *Mohori Bibee v. Dharmodas Ghose*, 30 Cal. 539, where a mortgagee of a minor's property had sued the minor for recovery of his mortgage claim, the Privy Council decided that a minor cannot enter into a valid agreement ; his agreement is void, and not merely voidable.

If a minor's agreement is wholly void, it follows that neither the minor nor the other party to the agreement can have it enforced in any Court of Law. The Courts, however, in India have given a more equitable interpretation to the dictum in *Mohori Bibee's* case. It goes without saying that a minor cannot be sued by the other

party on his agreement; but the question arises as to whether a minor can obtain as against the other party the benefit of his agreement. The Madras High Court has held (in *Raghavachariar v. Srinivas*, 40 Mad. 308) that a minor in whose favour a mortgage is executed can have, in equity (though not in law) the benefit of it; so also the Rangoon High Court has held (in 2 Rang. 1) that a promissory note in favour of a minor can be made use of to benefit the minor. These decisions have been based on the principle: you must protect the minor, **and not embarrass him** by depriving him even of the benefit of his agreement.

### **Can there be any specific performance of a minor's agreement?**

In so far as a minor's agreement is void, it cannot be specifically performed; neither the minor nor the other party can ask for specific performance of the agreement. (*Sarwarjan v. Fakruddin*, 39 Cal. 232; see also 8 Lah. 212; 55 Cal. 841; 38 Mad. L. J. 77.) The only exception seems to be in the case of an agreement to sell or buy property entered into by a certified guardian of a minor; if the guardian acts with the leave of the Court and enters into such an agreement it can be specifically enforced in favour of the minor (but not against him) if it is for the benefit of the minor. But if the agreement is not for the benefit of the minor, there can be no question of any specific performance. (22 Cal. 545; 29 All. 213; 1929, Pat. 226; 35 All. 499.)

### **No subsequent ratification of a minor's agreement enforceable**

A minor's agreement being void, the minor cannot, on attaining majority, ratify (approve and give effect to) the agreement entered into while he was a minor. (*Mahendra v. Kailash*, 55 Cal. 841; *Indian Cotton Co. v. Raghunath*, 1931, Bom. 178, 182; see also 51 All. 164; 37 Mad. 38; 11 C. W. N. 195.)

### **Minor fraudulently representing himself to be of full age can subsequently plead minority**

There can be no estoppel against a minor.

A minor who has deceived the other party to the agreement by representing that he was of full age is not prevented from later asserting that he was a minor at the time he entered into the agreement. (*Sadiq Khan v. Kishor*, 30 B. L. R. 1342; *Gadigeppa v. Balangauda*, 55 Bom. 741; *Leslie v. Sheil*, 1914, 3 K. B. 607), because the rule of estoppel is only a rule of evidence — a rule of **formal** law; the Contract Act which is the **substantive** law **overrides** the mere **formal** rule of estoppel.

For having fraudulently induced the other party (on the misrepresentation that he was a major) to enter into the agreement with



him, the other party cannot sue the minor even in tort, for one cannot convert a contract into a tort to thereby sue a minor. (Leslie v. Sheill, 1914, 3 K. B. 607.)

**Liability of the minor's property for the payment of a reasonable price for necessities supplied. Payment Quantum Valebant**

If a trader supplies a minor with necessities which, looking to the status and social position of the minor (2 Q. B. 369; 6 All. 417; 32 All. 325), can be properly regarded as articles of necessity for the minor or for the person whom the minor is legally bound to support, *e.g.*, members of his family, the person supplying the necessities can recover **from the minor's property, if any, a reasonable sum of money** looking to the value, at the time of supply, of the necessities. (Nash v. Inman, 1908, 2 K. B. 1). If the minor agreed to pay any specified price, the same is not enforceable at law, for a minor cannot enter into a valid agreement. His obligation, to the extent of his property, is **quasi-contractual**, and not contractual. It may also be noted, that though the minor's property is liable to a reasonable compensation (*quantum valebant*, *i.e.*, what is valued for the quantity supplied) the minor himself is not personally liable (49 All. 52; 35 Cal. 320; 39 Mad. 915). If the minor **had**, at the time the necessities were supplied to him, a **sufficient quantity** of those necessities **already** with him, the person supplying is not entitled to recover anything. It is also important to note that what may be necessities to a rich man's son might not be necessities to a minor in poor circumstances.

**Is a minor liable to make compensation for benefit received by him under a void agreement ?**

No; a minor cannot be compelled to compensate for any benefit received by him under his agreement which is void in law. (45 Bom. 225; 32 All. 25.) But under the Specific Relief Act, in a fit and proper case, **on equitable considerations**, the Court would compel the minor when he himself brings a suit against some other party, to make good first any payment due to that other party. Thus, if A, a minor, during his minority sold his property to X, and received the purchase money for the same, he should refund the purchase-money to the innocent purchaser who had acted in good faith and without notice of the minority of the seller, if he (A) brings a suit to recover from X the property sold. If the minor does not refund the purchase-money which he received from the purchaser, his suit would be disallowed by the Court. (28 Bom. 181; 54 Mad. 112; 40 All. 558; 27 Bom. L. R. 621.)

**Is a person standing as surety for a minor liable ?**

A guarantees the fulfilment of an agreement made between X, a minor, and Y. If X does not discharge his promise, can Y sue A

who has guaranteed the performance of the contract? Yes; A the surety is liable, though X, the minor is not liable. (*Kashiba v. Shripat*, 19 Bom. 697), for otherwise nobody would deal with a minor; on a minor's agreement though the minor cannot be held liable, there is no reason why the surety should escape liability. The surety, if a major, is liable on his promise.

**Is a person making a promise with a minor in favour of another liable?**

A, along with X, a minor, promises to pay Rs. 1,000 to P for value received. X, the minor is not liable, but A who is a major is liable. (*Das v. Chand*, 4 Lah. 334), because A is a major at the time of his promise. The other promisor X, being a minor cannot be held liable.

**Can the guardian of a minor enter into a contract of marriage on his behalf?**

A guardian of one who is a minor can enter into a **contract or marriage** on behalf of the minor, and such a contract would be good in law, and an action for damages for breach of it would lie, if the contract is for the benefit of the minor (*Rose Fernandez v. Joseph Gonsalves*, 48 Bom. 673), if the parties are of the community, like Goans, Hindus among whom it is customary for parents to contract marriage for their children.

**Minor and membership in company**

It is not settled law as to whether a minor can be a shareholder or member of a registered company. In *Jaffer v. The Credit Bank of India Ltd.*, 39 Bom. 331, it has been held by the Bombay High Court that a minor can, in the absence of any provision to the contrary in the Articles of Association of the Company, be a member of it. But a minor is not liable for calls, though he can share in the surplus assets, if any. If, on majority the minor does not repudiate his agreement to be a member he will become a member and shall be liable as such. (*Jaffer v. Credit Bank*, 39 Bom. 331.)

**Minor can be admitted to the benefits of partnership**

A minor **cannot be a partner in a firm**, but, with the consent of all the partners, he can be admitted to the **benefits of partnership**. A minor admitted to the benefit of partnership can have his agreed share in the profits of the firm and can inspect the books of the firm but cannot bring a suit for the recovery of his share in the profits or for accounts, unless he wants to give up his connection with the firm. "At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the

benefits of partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm : Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months." This is how under the Indian Partnership Act the position of a minor, after he has attained majority, is described. If the minor does not give the public notice, as aforesaid, *i.e.*, notice to the Registrar of Firms (where the firm is a registered firm), notice in the local Official Gazette and a notice in a local vernacular newspaper circulating in the area in which the firm does its business, that he has left the firm, or if he has become a partner, he the minor shall be liable for all the debts of the firm contracted by the firm since the date of his admission to the benefits of partnership. In England, an infant who elects to be a partner, or is deemed to be such, is not liable for debts contracted by the firm before the day on which he became a major ; in English Law, the liability of the infant arises only on his attaining majority, if there is no repudiation within a reasonable time thereafter, for debts of the firm contracted after the infant attained majority.

### **Can a minor be an agent ?**

The Indian Contract Act provides that as between the principal and outsiders, any person may become an agent, but no person who is not of majority and of sound mind can become an agent so as to be responsible to his principal. A minor therefore can be an agent, so as to bind, by his *intra vires* acts, his principal, but not so as to bind himself. Though a minor may be in law a validly appointed agent, yet he himself cannot appoint an agent. A minor, therefore, cannot appoint a proxy to vote for him at his company's meeting. But a minor cannot be a licensed insurance agent, as the Insurance Act so says.

### **Minor's rights and liabilities on Negotiable Instruments**

A minor can draw, make, indorse, deliver and negotiate promissory notes, bills of exchange, cheques, so as to bind all parties except himself. He himself is not liable, but all the other parties to the instrument, who are majors are liable in their respective capacities.

### **Can a minor be adjudicated insolvent ?**

A minor cannot be adjudicated insolvent. (Ex parte Jones, 1881, 18 Ch. D. 109 ; Charan v. Krishnadhan, 49, Cal. 560.) Whether a minor can be adjudicated insolvent if he has been indebted for goods supplied to him which were, looking to his position and status in life and his wants at the time they were supplied to him, necessities of life, is a question the answer to which is not quite free from

doubt. (See *Peters v. Fleming*, 1840, 6 M. & W. 42), where it was held that he could, in respect of necessities supplied to him and not paid for, be declared insolvent. But this decision has been doubted by the learned jurist and Privy Councillor Sir Dinshah Mulla in his learned "Lectures on Insolvency Law".

## LUNATIC'S AGREEMENTS [Secs. 11 and 12]

### Who is a lunatic ?

In law, a lunatic means a person who has not got a sound mind. A "sound mind", for the purposes of making a contract, means a mind which can understand what is being done by its possessor. If a person can understand the contract he is entering into, and can understand the consequences of his action so far as his interest is affected thereby, he is said to have a sound mind. A person who cannot understand the effects of his action on his interests is of unsound mind, for the purposes of entering into contractual obligations.

A lunatic may have lucid intervals, *i.e.*, times when he gets the faculty to understand what he is doing. But an "idiot," *i.e.* a mental dwarf—a person whose mental capacities have remained stunted—cannot ever enter into a valid contract, because he never can understand.

### Can a lunatic contract?

A person who does not possess a sound mind cannot enter into a contract. A lunatic's agreement is, as a rule, void. A lunatic cannot enter into a contract, except while he is in his lucid interval. In his lucid interval, even a lunatic in a lunatic asylum may enter into a valid contract or make a valid disposition of his property, by will, sale or otherwise, unless a committee has been appointed in his case. A sane man who is delirious because of high fever or who is so drunk that he does not understand what he is doing cannot in his insane interval enter into any valid contract or other disposition of property. This applies to a person under the influence of hypnosis and to persons of unsound mind because of old age or mental decay or temporary grief.

A person who is usually of sound mind, but occasionally of unsound mind, cannot make a contract while he is of unsound mind. (*Kamola v. Kaura*, 41 P. R. 1912.)

With regard to a person who is usually of sound mind, the presumption is that he was of sound mind while he entered into the contract. Any person, trying to show that the contract was entered into in an occasion of temporary insanity, must prove that unsoundness of mind existed at the time the contract was entered into. A person who is usually of unsound mind is presumed to be of unsound mind, until the contrary is proved.

**Drunkenness** may amount to insanity if the person concerned was so drunk that he could not, while he entered into the agreement, realize the effects of his act on his own interests.

A person who is adjudged insane by inquisition under the Lunacy Act is not capable of making any disposition of his property as long as the inquisition is in force. In case a committee is appointed to control his affairs, a lunatic cannot contract even during his lucid interval.

If a contract entered into by a lunatic or person of unsound mind is for his benefit, it can be enforced (for his benefit) against the other contracting party. (*Jugal Kishore v. Cheddu*, 1903, 1 All. L. J. 43.)

For necessities supplied to a lunatic or to any member of his family, the lunatic's **estate, if any**, is liable ; but there is no personal liability incurred by the lunatic. The lunatic would be ordered to pay out of his property such reasonable value for the necessities supplied as the Court thinks fit to allow. The necessities must be necessities, looking to the status of the lunatic and his actual wants at the time the goods were supplied.

### **Contractual capacity of a Body Corporate**

A Corporation can contract in the manner laid down by its Deed of Constitution. A Corporation cannot enter into any contracts which fall outside the scope of its powers as defined or conferred by its Memorandum or Charter or Documents of Incorporation. If an act is *ultra vires* the corporation's memorandum or charter, the act is wholly void, and even all the corporators of the corporation cannot ratify it. If an act, however, is *ultra vires* the directors or officers of the corporation, the act may be ratified (given effect to) if it is *intra vires* the memorandum. (*Ashbury Railway Carriage & Iron Co., Ltd. v. Hector Riche*, 7 H. L. 653.)

### **Disqualification in certain cases**

A barrister is, by the etiquette of his profession, disqualified to sue for his professional fees. If a barrister writes a book he can sue for the sale proceeds of the same. Or, if he sells some property he can sue for the recovery of the purchase money. But so far as his professional fees are considered it is contrary to the prestige of his profession and the dignity of his calling to stoop to such a suit, his services being *de honoris causa*. The same applies to Fellows, Members and Licentiates of the Royal College of Physicians and Surgeons. But a doctor of medicine (who is a University man, and does not belong to the Royal College), can sue for his professional fees, if he so desires to do.

## CHAPTER VIII

### CONSENT—UNDERSTANDING THE SAME THING IN THE SAME SENSE

For the validity of an agreement, it is essential that the parties to it must have consented or agreed to the **same** thing in the **same** sense. Two or more persons, being parties to an agreement, are said to **consent**, when they understand the **same** thing in the **same** sense. It is when there is consent, that parties are said to be *ad idem* ; their minds are in accord. [Sec. 13]

#### Consequence of want of consent

If parties do not **consent**, *i.e.*, understand the **same thing in the same sense**, there can be no agreement, because consent is like the very roots of an agreement. If there is no consent the parties are not said to be *ad idem* (of the same mind). If A goes to a restaurant and orders out a glass of lemon squash made in water and the waiter brings only an ordinary aerated lemon water, there is no contract or obligation to accept that, because there is a mistake common to the mind of each of the parties, *viz.*, the customer and the waiter.

If there is any mistake as regards the subject matter of the transaction, or as regards the nature of the transaction, or as regards the identity of the parties to an agreement, there cannot be any contract, because consent which is of the essence of a contract is lacking.

#### Mistake—its effect on the transaction [Secs. 20, 21, 22]

A mistake may be of law or of fact. If it is a mistake of law, the agreement cannot be avoided, except when the mistake is with regard to a foreign law in which case it would be considered a question of fact, because one is not bound to know the law of a country other than his own, though he must know the law of his own country. In other words it is a mistake of fact that may avoid an agreement. *Ignorantia facti excusat ; ignorantia juris non excusat* (Ignorance of fact excuses ; Ignorance of law does not excuse). [Sec. 21]

In order that a mistake of fact may be capable of avoiding the transaction it is necessary to show that the mistake was **bilateral** and not unilateral *i.e.*, it must be common to the mind of both or all the parties to the contract. If a mistake of fact, however, is induced by fraud of a party to the contract then, though unilateral, it is capable of avoiding the contract on the principle : "*non est factum*" (this is not my act). [Secs. 20 ; 22]

Where a person agreed to buy from another person 120 bales of Surat Cotton which was to arrive ex "Pearless" from Bombay, and where there were two ships by that name, and A understood one of them while B thought of the other one, and the cotton to arrive thereon, it was held that as the parties were not in accord, there was no agreement. (*Raffles v. Wichelhaus*, 1864, 2 H. & C. 906.) There was a mistake as to the subject matter of the transaction. If the mistake is not common to the minds of the parties to the contract, it may happen, though in an exceptional case that because of an ambiguous name each party is mistaken as to the other's intention, and neither then is prevented from showing his own intention. (*Falek v. Williams*, 1900, A. C. 176.)

There may be a mistake in an agreement regarding the **identity** of the person who is supposed to be a party to it. (*Cundy v. Lindsay & Co.*, 1878, 3 App. Cas. 459.) Where one Blenkarn, knowing that Blenkiron & Co. were the reputed customers of Lindsay & Co., ordered some goods from Lindsay & Co., so signing his name as would appear to be that of Blenkiron & Co. it was held that there was no contract, because Lindsay & Co. **never did want to contract with Blenkarn.** They thought that they were contracting with Blenkiron, their usual customer, but as a matter of fact by a clever trick Blenkarn had got possession of the goods from Lindsay & Co., and sold them away to one Mr. Cundy who was an innocent purchaser (for value) of those goods. The question that arose in that case before the Court was whether Lindsay & Co., can recover the goods taken from them by trick by Blenkarn and sold to an innocent purchaser Mr. Cundy. It was argued on behalf of Mr. Cundy that in so far as he (Mr. Cundy) was an innocent purchaser for value, he could get a good title to the goods. But the Court held that the Sale of Goods Act did not apply to such a case, because there was no agreement at all. The Sale of Goods Act could apply only **if there is ab initio a contract** (though induced by fraud or misrepresentation or coercion). But where there is no contract at all, **where consent which is of the very essence of the contract is lacking altogether**, the Sale of Goods Act could not apply, and the doctrine *nemo dat qui non habet* (no one can give or transfer who himself does not possess) could not apply to the case. There was no contract in *Cundy v. Lindsay & Co.*, because there was a mistake **as to the identity of the person** with whom Lindsay & Co. thought they had contracted. Lindsay & Co. thought that they had contracted with Blenkiron & Co. and they never had any idea that they were entering into any transaction with Blenkarn. Had they known of that fact they would not have entered into the transaction. So they could successfully plead the doctrine "*non est factum*." But where there is really a contract *ab initio*, though induced by an unfree consent, and if before the aggrieved party could avoid the agreement and get back his property, the same has been sold away or transferred to a **bona fide** purchaser

**for value**, the latter gets a good title to the goods, under the provisions of the Indian Sale of Goods Act. See *Bailie's case*, 1898 1 Ch. 110; *Gordon v. Street*, 1899, 2 A. B. 641.

A, a well-dressed person, goes to a shop and tells the salesman or the manager there that he would have goods on account and that he would pay for them later when the bill is sent to him in the ordinary course of business. The shop-keeper **consents** to sell to A goods on credit, believing that A, who appears to be a decent person, would pay up the money, being the price of the goods bought by him. A really had no intention to pay for the goods. He wanted to abscond after selling them away to some one else. After leaving the shop he sells the goods to a **bona fide purchaser for value**. Does that purchaser get a good title to the goods, or can the shop-keeper get them back from him? The shop-keeper cannot recover the goods from the innocent purchaser for value, because in this case we have a **contract ab initio**; it is not the case of a void agreement as in the case of *Cundy v. Lindsay & Co.*; it is the case of a valid agreement, where consent is present, though obtained by a trick, and the aggrieved party, *viz.*, the shop-keeper can get back the goods from A before he sells them away to any one else being a bona fide purchaser for value. But once the goods are sold by A to a bona fide purchaser for value, the Indian Sale of Goods Act would apply, and the shop-keeper cannot get back the goods. (See also *Boulton v. Jones*, 1857 H. N. 564; *Jaggan Nath v. Secretary of State* 1886, Punj. Rec. No. 21.)

Where there is a mistake with regard to **the nature of the transaction** there cannot be a contract. Where an old gentleman, not capable of reading (by reason of age), was asked to sign a document which he was told was a guarantee, though it was really a bill of exchange, and he, believing it to be a guarantee and intending to sign a guarantee, signed the document, it was held by the Court that he was not liable even to a bona fide holder for value of the bill of exchange, because his signature was obtained by fraud of the other person on a document **which he never did intend to sign as a bill**. Had the old gentleman known it to be a bill he would not have signed it; there was **no consent** in that case, and therefore there was no contract *ab initio* and there was no liability. (*Foster v. Mackinnon*, 1869, L. R. 4 C. P. 704; *Chimanram v. Divanchand*, 1932, 56 Bom. 180; *Banku Behari v. Krishto*, 1903, 30 Cal. 433; *Oriental Bank v. Fleming*, 3 Bom. 242, 267; *Lewis v. Clay*, 1898, 67 L. J. Q. B. 224.)

### Free Consent. [Sec. 14]

It is essential for the enforceability of an agreement that the consent should be free; otherwise a party whose consent has been obtained in an unfree manner can avoid his liability under the agreement. The consent should not have been obtained by coercion, undue influence, fraud, misrepresentation or mistake.



**Coercion [Sec. 15]**

Coercion means and involves the committing or threatening to commit an act forbidden by the criminal law or the wrongful withholding of property belonging to another person, to the prejudice of that person **or any person whatever**, with the intention of inducing that person to enter into a contract. It is immaterial whether the provisions of the criminal law are or are not applicable to the place where the coercion takes place.

**'Coercion' and 'Duress'**

What is called 'coercion' in India is known as 'duress' under the English Law. Under the English law, duress involves actual or threatened violence or restraint of liberty with regard to the other party to the contract, or his wife, parent, or child; and the act or threat must have been committed or given by the party to the contract or by one acting with the knowledge or for the advantage of such party to the contract. It is further important to note that any act or threat with regard to one's goods is not duress; the act or threat must be with regard to one's **person and not property**. According to the Indian Law, on the other hand, the term coercion has a wider implication. Coercion may be against person or against property. It may be an act or a threat to commit an act forbidden by the Criminal Law, or a wrongful withholding of the property of another person to his prejudice; and it may not be directed against the other party or his wife, parent or child; it may be directed against **any person**.

A, on board an English ship on the high seas, causes B to enter into an agreement with him through an act amounting to criminal intimidation under the Indian Criminal Law. A afterwards sues B for breach of contract at Calcutta. A has employed coercion although his act is not an offence under the English Law, and although section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

Where an agent appointed for a period of time refused to hand over to his principal or to the new agent the books of account regarding the business at the end of his term of office, unless his principal released him from all liabilities in respect of acts done by him as agent, and the principal, because of this coercion, did give the release, it was held that the release deed was voidable at the option of the principal on the ground of coercion. (*Muthiah Chettiyar v. Karuppan Chetti*, 1927, 50 Mad. 786.)

A mere threat given by one person to another to prosecute him does not amount to coercion because it is not in itself an act forbidden by the Criminal law. But the Allahabad High

Court has held that a bond executed by a judgment debtor in favour of his decree-holder to obtain a release from custody in execution of the decree of a Court which had no jurisdiction to pass it, was void. (*Banda Ali v. Banspat Singh*, 1882, 4 All. 352.) And the Madras High Court has held that an adoption by a girl, aged 13, is not binding, when it has been obtained from her by her husband's relatives by pressure on her by obstructing the removal of her husband's corpse. (*Ranganayakamma v. Alwar Setti*, 1890, 13 Mad. 214.)

In *Amiraju v. Seshamma*, 1918, 41 Mad. 33, the Madras High Court held that where a person by a threat to commit suicide, made his wife and son execute a release deed in favour of his own brothers with regard to certain property which they, the brothers, claimed as their own, the release deed was not enforceable against the wife and the son, because the threat to commit suicide did amount to coercion under the Indian Contract Act. Wallis, C. J. and Seshagiri Iyer, J., held: "it was impossible to hold that an act which it is made punishable to abet or attempt is not forbidden by the Indian Penal Code, especially as the absence of any section punishing the act itself is due to the fact that the suicide is in the nature of things beyond the jurisdiction of the Court;" but Oldfield, J., held that the Indian Contract Act should be construed strictly and that an act not punishable under the Indian Criminal law cannot be said to be forbidden by the law.

### Undue Influence [Sec. 16]

When a person who is in a position to dominate the mind of the other party to the agreement, uses that position to the prejudice of that other party, and gets out of the agreement an unfair advantage, his act is said to be an act of undue influence, and the aggrieved party can avoid the agreement on the ground of undue influence. A person, for example, who holds authority, real or apparent, over the other person to the agreement, or who stands in a fiduciary relation to the other party to the agreement, can be regarded as being in a position to dominate the will of that other party. Similarly, a person who enters into a contract with another person whose mental powers are temporarily or permanently affected by reason of mental or physical distress, illness or age, is said to be in a position to dominate the mind of the other party. When a person, who is in a position of dominating the will of the other party to the agreement, enters into an agreement, which on the very face of it seems to be unconscionable, the Court would presume that the contract was obtained by undue influence, and if the other party to the contract wishes to show the absence of undue influence, the burden of proof will be on him for setting aside the presumption of undue influence which appears on the very face of the contract.

Under the Contract Act, the words "the relation subsisting between the parties" show that the undue influence must come from a party to the contract and not an outsider. In *Narayan v. Buchraj*, 1927, 53 Mad. L. J. 842, it has been held by the Madras High Court that the undue influence may proceed even from a third party, *i.e.*, a person who is not a party to the contract. It is submitted, that the Madras ruling is not in consonance with the wording of the Contract Act. (See also *Raj Coomar v. Alfuzuddin*, 8 Cal. L. R. 419.) Where it is shown that the outsider from whom undue influence has come has acted in connivance or collusion with a party to the contract, the undue influence coming from an outsider would be sufficient to bring the case within the purview of the Contract Act.

✓ Unfair advantage means any gain, benefit or advantage obtained by unrighteous or undesirable means. (*Ganesh v. Vishnu*, 1908, 32 Bom. 37). A, having advanced to his son B, during his minority, obtains, upon B's attaining majority by misuse of parental influence, a bond from B for a greater amount than the sum in respect of the advance. A is guilty of undue influence.

A, a man enfeebled by disease and age, is induced by B, who is his medical attendant, to agree to pay him (B) an unreasonable sum for his professional services; the agreement can be avoided by A, because B has employed undue influence, having been in a position to dominate the mind of A.

A, being in need of money, goes to a money-lender at a time when there is a stringency in the money market. The lender refuses to make any loan unless A agrees to pay interest at a very high rate. A agrees, as he has no alternative. This contract is not induced by undue influence, because the loan is made at a time of stringency in the money market.

A being in debt to B, contracts a fresh loan on terms which appear to be unconscionable; the burden of proof will lie on B who must show that the contract was not induced by undue influence if he is to successfully enforce it in a Court of law.

While Courts of law set aside transactions on the ground of undue influence, they would make no concession with regard to transactions involving lack of judgment, want of prudence or absence of foresight. The Courts do not encourage negligence or folly. One has to thank himself for his own negligence or folly, and cannot claim relief in a Court of law. But where there is fraud or trick involved and an unfair advantage obtained, Courts would certainly interfere and render equity. (*Allcard v. Skinner*, 1887, 36 Ch. D. 145; *Smith v. Kay*, 1859, 7 H. & L. C. at p. 779.)

To prove that undue influence has been exercised, the plaintiff or the defendant, as the case may be, must satisfy the Court that the other party was in a position to dominate his will and that he

actually used that position for obtaining an unfair advantage or gain for himself. (*Poosathurai v. Kannapa*, 1920, 43 Mad. 546 P.C.; *Ganesh v. Vishnu*, 1908, 32 Bom. 37; *Bank of Bengal v. Din Dial*, 1901, *Punj. Rec.* No. 36.) A party to a contract can avoid it if he can show that the other party was in a position to dominate his will and actually made use of that position. When the transaction appears on the face of it to be unsonscionable, the burden of proof will be on the other party to show that it was not unconscionable. (*Raghunath Prasad v. Sarju Prasad*, 1924, 3 Pat. 279.)

Confidential relations, or relations of a type in which one can dominate the mind of the other, are presumed to exist between persons such as parent and child, guardian and ward, lawyer (also managing clerk) and client, physician (or surgeon) and patient, trustee and cestui que trust, spiritual adviser and disciple. (*Lakshmi Dass v. Roop Laul*, 1907, 30 Mad. 169; *Toolseydas v. Premji*, 1889, 13, Bom. 61; *Allcard v. Skinner*, 36 Ch. D. 145 at pp. 181, 182; *Liles v. Terry*, 1895, 2 Q. B. 679; *Shamaldhone v. Lakshimani Debi*, 1909, 36 Cal. 493; see also *Brojendra Nath*, 6, Cal. W. N. 816; *Raja Papamma*, 5 Mad. L. J. 234; *Harivalabhdas v. Bhai Jivanji* 1902, 26 Bom. 689; *Dent v. Bennet*, 4 My. & Cr. 269; *Mannu Singh v. Umadat*, 1890, 12 All 523.)

The relation between husband and wife is not, without more, such as gives rise to a presumption of domination. (*Howatson v. Webb*, 1907, 1 Ch. 537.)

The relation between mother and daughter is not, of itself, one in which the position of dominating the mind of the other can be presumed. (*Ismail v. Fafizboo*, 1906, 33 Cal. 733.) Likewise, the relation between landlord and tenant does not come within the purview of the Contract Act, because ordinarily no apparent or real authority is deemed to be held by a landlord over his tenant. (*Pro-mada Nath v. Kinoo Mollali*, 1908, 8 Cal. L. J. 135.) The same is true also with regard to the relation between a creditor and debtor. Without more, a creditor is not deemed to be in a position to dominate the mind of the debtor. It has been held in several cases that even the urgent need of money by a borrower does not by itself mean that the lender was in a position to dominate the will of the borrower. (32 Bom. 37; 34 Cal. 150, 156; 1 Pat. 263; 31 Cal. W. N. 693.) But there may be circumstances to show that the creditor was really in a position to dominate the will of the debtor, *e.g.* when the creditor knew that the debtor was in need of money and that he would be forced to borrow the money and he (the creditor) charged a usurious return. (*Ramadhan v. Jiwan Khan*, 1879, *Punj. Rec.* No. 110.)

In a case where an old Hindu lady made a gift of the whole of her property to her spiritual adviser, hoping that thereby she would secure benefits to her soul in the other world, the Court held the

gift invalid, because the spiritual adviser was in a position to dominate her will and had not shown that he had not made an undue advantage of the position in which he was. (*Manu Singh v. Umadat*, 1890, 12 All. 523.) A gift made by a beneficiary under a trust of a portion of his trust funds to the trustees was held voidable under the Contract Act on the ground of undue influence.

### Pardanishin Woman

A *pardanishin* woman is one, who according to the custom of her community, observes seclusion from the world. (*Buzloor Ruheem v. Shumsoonnissa Begum*, 1867, 11 Moo. I. A. 551 (P.C.); *Fayyaz-ud-din v. Kutab-ud-din*, 1929, 10 Lah. 761, 766.) But the mere fact that the woman lives in some degree of seclusion, and is thus quasi *pardanishin*, would not make her *pardanishin* woman within the meaning of the Contract Act. (*Hodges v. Delhi & London Bank*, 1901, 23 All. 137; *Ismail v. Hafiz Boo*, 1906, 33 Cal. 773; *Sheikh Ismail v. Amirbibi*, 1902, 4 Bom. L. R. 146.)

Under the law, a contract made by or with a *pardanishin* woman can be avoided by her, at her option unless the other party to the contract satisfies the Court that the contract was not only read over **and explained to her** but that she also **understood** its meaning and its effects upon her own interests. (*Shambati Koeri v. Jago Bibi*, 1902, 29 C. 749 (P.C.); *Annoda Mohun v. Bhuvan Mohini*, 1901, 28 Cal. 546 (P.C.); *Kali Baksha v. Ram Gopal*, 1914, 36 All. 81 (P.C.); *Shamsuddin v. Abdul Hussein*, 1907, 31 Bom. 165; *Hoti Lal v. Ram Piari*, 1903, Punj. Rec. No. 77; *Rai Rajeshwar v. Har Kishen*, 1933, 8 Luck. 538; *Mariam Bibi v. Sheikh Mohammad*, 1918, 28 Cal. L. J. 366, 367; *Sunitabala Debi v. Dhara Sunderi Devi* (1919) 46 I. A. 272; *Tara Kumari v. Chandra Mauleshwar*, A. I. R. 1931, P. C. 303). In *Kali Baksha v. Ram Gopal*, 1914, 36 All. 81 (P.C.), it has been held that there is no absolute law that a deed executed by a *pardanishin* woman should be set aside if it is not proved that she had independent advice. If the grantor comprehended and of her free will entered into a transaction, that would be enough to make the deed valid.

### High rate of interest in contracts

The mere fact of the rate of interest being high is not evidence of undue influence. A, who is in urgent need of money, borrows money from a lender who charges him very high rate of interest. This transaction is not, without more, one of undue influence. It has been held by the Privy Council that interest at a rate of 24% per annum could be allowed in the absence of any evidence to show that the lender exercised any threat or pressure on the borrower. [*Raghunath Prasad v. Sarju Prasad*, 1924, 3 Pat 279, (P.C.); see also the Money-lender's Act, of the province concerned, whereby it is not permissible to charge at more than the authorised rate.] See also:

Hari v. Ramji, 1904, 28 Bom. 371 ; Satish Chunder v. Hem Chunder. 1902, 29 Cal. 823 ; Khota Ram v. Nawaz, 1923, 4 Lah. 76 ; Appa Rau v. Suryanarayana, 1887, 10 Mad. 203 ; Ramalingam v. Subramanyam, 1927, 52 Mad. L. J. 612 ; Debi Sahai v. Ganga Sahai, 1910, 32 All. 589.

Except where the lender knew of the borrower's heavy need for money and took an unfair advantage of that knowledge, or exercised pressure upon the borrower, a high rate of interest was allowed by the Courts.

Under the Usurious Loans Act, whenever it is found that the rate of interest charged is very high or unfair under the circumstances of the case at hand, the Court can interfere and curtail the rate of interest and allow interest at such rate as it thinks fit and proper, even though no undue influence has been proved. (See also Kumar Narendra v. Pabon, 1930, 52 Cal. L. J. 73 ; Baldeo Singh v. Bulaki Das, 1910, 7 All. L. J. 59.)

### Misrepresentation [Secs. 17 & 18]

Misrepresentation is of two kinds—(1) *fraudulent* and (2) *innocent*.

Fraudulent misrepresentation or fraud takes place, when a party to a contract, or some one with his connivance, or an agent of a party to the contract with the intention of deceiving the other party to the contract or the agent of such other party, commits an act with the intention of deceiving the other party, or does an act or omits to do an act or omits a fact (*suppressio veri*), as is specially declared by the law to be fraudulent, or says something which is false (*suggestio falsi*), or actively conceals a defect so that the same may not be discovered by the other party to the contract, or makes a promise without intending to perform it. [Sec. 17] As a rule, mere silence does not amount to fraud. If A sells to B a horse which A knows to be unsound, and says nothing to B about the unsoundness of the horse, his silence does not amount to fraud. But if B is A's daughter and has just come of age, the relation between the parties is such that it makes it A's duty under the law to tell his daughter B about the unsoundness. (Illustrations to Section 17 of the Indian Contract Act. But if B, in that illustration, says to A, "If you do not deny, I shall take it for granted that the horse is sound," and if A says nothing, A's silence would be equivalent to speech, because he was told definitely by the other party that his silence would amount to an answer so to say. As a rule the maxim '*caveat emptor*', i.e., beware buyer, prevails.

The mere commendation of one's own goods does not amount to fraud because such commendation is not a material misrepresentation, and in practice people are inclined to praise their own goods. The legal maxim is : *simplex commendatio non obligat*, simple or mere commendation does not oblige or bind one who makes it.

### Uberrimæ fidei agreements

*Uberrimæ fidei* agreements are agreements in which the law casts upon the parties a duty to disclose to each other every material fact within knowledge. If a material fact within the knowledge of a party is not disclosed to the other party, the latter can, at his option, avoid the agreement on the ground of misrepresentation. In such a case mere silence does amount to misrepresentation, because it was the duty of the parties to mutually declare the facts. An insurance contract, for example, is an *uberrimæ fidei* agreement in the fullest sense of the expression *uberrimæ fidei*. It is the duty both of the insurer and the insured to reveal every material fact within knowledge; otherwise the contract is avoidable by the aggrieved party on the ground of fraud. There are also what are known as *quasi uberrimæ fidei* agreements. Thus under the Transfer of Property Act, an omission to make certain types of disclosures by the seller amounts to fraud. Similarly there is a duty cast on the buyer to disclose material facts to the seller. A contract of suretyship or a partnership requires disclosure of facts within the knowledge of the creditor (promisee), in a contract of guarantee, or the partner or partners, as the case may be in a partnership contract; but such contracts are not strictly *uberrimæ fidei* but are *quasi uberrimæ fidei*. (Davis v. London Insurance Co., 1878, 8 Ch. D. 469.)

In a contract of insurance the law casts upon the parties the duty to make fullest disclosure of facts within knowledge. (London Assurance Co. v. Mansell, 1879, 11 Ch. D. 383.)

The case of a lawyer and his client also involves the duty to disclose to the client material facts; otherwise there would be a breach of the confidence reposed by the client in the lawyer. Thus in *Macpherson v. Watt*, 3 A. C. 254, it was held that a solicitor, who purchased property from his client nominally for his brother, but really to get transfer back from his brother to his own name, could not keep it, because he had not disclosed to his client the fact that he was buying the property for himself, and it could be no defence for the solicitor that apart from the silence, the transaction was a proper one and in no way unfair to the client.

Misrepresentation may be innocent, *e.g.*, when the party making an incorrect statement has made it without knowing that it was incorrect and believing that it was correct. If there was no intention to deceive, a breach of duty obtaining an advantage to the person guilty of the breach, or to any one claiming from him by misleading the other party or any one claiming from such other party, is also innocent misrepresentation. [Sec. 18]

### Distinction between fraud and misrepresentation

In the case of fraud the person who makes a false statement makes it **knowing** it to be false, or makes it **not believing it to be true, or so recklessly** as to take no care to find out whether what he says is true or not. In innocent misrepresentation, on the other hand, a person making a statement makes it **without the knowledge** of its falsehood, and with a belief in its truth.

When a party is aggrieved by fraud, he can sue the person guilty of the fraud for **damages** for any damage that he may have suffered by reason of the fraud (the fraud having been successfully played on him). In the case of innocent misrepresentation, on the other hand, the aggrieved party cannot sue for damages, but can only avoid the agreement. (*Redgrove v. Hurd*, 20 Ch. D. 1.)

In the case of fraud, as a rule, the person guilty of the fraud cannot say that the plaintiff had independent means of discovering the truth with regard to the facts, if the aggrieved party actually fell a victim to his fraud. (See *Currie v. Rennick*, 1886, Punj. Rec. No. 41.)

### Constructive Fraud

1 A person who makes a statement without knowing it to be false, but **recklessly**, *i.e.*, without taking the slightest trouble to enquire into its validity, is said to be guilty of constructive fraud. (*Rees Mining Co.'s case*, 4 H. L. 64.) Thus where the directors of a registered company issued a prospectus stating therein the advantages the company would be having, and they had not taken the trouble to inquire into the veracity of the statement before making it, they were held responsible for **constructive fraud**.

### Avoidability of agreement on the ground that the consent is not free [Secs. 19 and 19A]

In any case of an agreement in which it is alleged that the consent to it was not free, *i.e.*, it was caused by coercion, undue influence, misrepresentation, fraud, the agreement is voidable at the option of the party whose consent was so obtained. Such party can either abide by the agreement or avoid it on the ground that the consent was not free. But when the consent was caused by misrepresentation or by fraudulent silence, the contract is not voidable, if the aggrieved party had the means of discovering the truth with ordinary diligence. Thus when a person has acted on his own knowledge or information, and is not deceived by the attempted fraud or misrepresentation, he cannot avoid the agreement he entered into. A by misrepresentation induces B to believe that



200 maunds of indigo are made every year at his factory. B, however, is allowed to examine all accounts and books of the factory and finds that only 100 maunds of indigo are made annually at A's factory. In spite of such knowledge B purchases the factory; he cannot avoid the agreement by pleading that A had made a misrepresentation, because B bought the factory in spite of the misrepresentation, and acting on his own knowledge and information revealed by the books of account.

In the case of fraud, the aggrieved party may avoid the agreement and sue for damages or may claim rescission of the agreement under the Specific Relief Act. It is open to him to refuse to carry out the agreement when sued upon it. He can defend a suit brought against him for damages or for specific performance. (*Rangnath v. Govind*, 1904, 28 Bom. 639.)

In an innocent misrepresentation, the party aggrieved can avoid the agreement, even though the statement was true at the time it was made but became otherwise later by reason of change of circumstances. (*O'Flanagan's case*, 1936, 1 Ch. 575.)

When a party to a contract has reasonable means of finding out for himself the truth it is his duty to exercise reasonable diligence. If the circumstances are such that on the exercise of reasonable diligence the truth could be known and because of the want of exercise of that diligence the facts are not known to the party, there would be no ground for avoidance of the agreement. Thus where A enquired of B whether the mares to be sold by him to A were sound, and B replied that the mares were, in his opinion; sound but that he would prefer their being bought by A after A's satisfying himself with regard to them through a friend, it was held that B was not liable to A for the horses' unsoundness, because A had reasonable means of discovering the truth for himself through a friend and B did not make any definite warranty so as to make himself liable. **B only expressed his opinion** that the mares were sound, but left the whole matter of the purchase to be decided by A himself at his own choice and on his own responsibility. (*Currie v. Rennick*, 1886, Punj. Rec. No. 41). Where a person has actively concealed the defect in the goods so as to make the discovery of the defect not possible in spite of reasonable diligence exercised by the other party, the latter can avoid the agreement on the ground of fraud. Thus where A, a dealer in horses, sold a mare to B with the knowledge that the mare had a cracked hoop, which he (A) had filled up so as to prevent detection even after a diligent examination, it was held that there was an **active concealment** of the defect and A was liable to B in damages. (*Akhtar Jahan Begam v. Hazari Lal*, 1927, 25 All. L. J. 708; *Subramanian Chetti v. Official Assignee of Madras*, A. I. R. 1931, Mad. 603; *Morgan v. Government of Hyderabad*, 1881, 11 Mad. 419.)

Ordinary diligence involves such diligence as a reasonable man would consider necessary having regard to the nature of the transaction and of the representation affecting its results. (Shoshi Mohun v. Nobo Kristo, 1878, 4 Cal. 801 ; Rustomji v. Vinayak, 1911, 35 Bom. 34 ; Kala Mea v. Harperink, 1909, 36 Cal. 323.) Where the fraud played by a person on another does not actually deceive the latter, there can be no claim for damages, because no damage has been suffered by reason of the fraud. The Latin maxim is : *Haud enim decipitur qui scit se decipi.* i.e. ; nothing is fraud which does not deceive.

Where a person aggrieved by a fraud nevertheless approbates the transaction, he is said to have waived his remedy to avoid the agreement. (Hakim Rai v. Kharak Singh, 1918 Punj. Rec. No. 42.) So also will the right to avoid the agreement be lost by reason of laches, i.e., unreasonable delay on his part. (Maharaja Sir Partab Singh v. Provincial Bank, 1891, Punj. Rec. No. 72.) And where because of an event that may have intervened it is not possible to restore the parties to their original position, there will not be any remedy by avoidance. (Clark v. Dickson, 1858, 27 L. J. Q. B. 223.)

### **Legal representatives' right to avoid agreement on the ground of fraud**

A suit for setting aside a document on the ground of fraud or misrepresentation, can, after the death of the aggrieved party, be brought by his legal representatives. (Goba v. Kashiram, 1927, 51 Bom. 133.)

## CHAPTER IX

### VOID, VOIDABLE, ILLEGAL, VALID, AND UNENFORCEABLE, AGREEMENTS

An agreement is said to be **void** if it is such that it cannot be enforced by **any** of the parties to it. An agreement may be void because of want of consideration, or because of the incapacity of the parties to it, or because it is illegal or is against public policy or the policy of the law. [Sec. 2]

An agreement is **voidable** if one or more of the parties to it can avoid it at his or their option **but the other party or parties cannot avoid it**. An agreement obtained by undue influence, coercion, misrepresentation, for example, is an agreement that is **voidable** but not void. On the other hand, an agreement in which consent is absolutely lacking, *e.g.*, one in which there is fraud vitiating consent altogether, or where there is a mistake of fact common to the mind of each of the parties to it, is void, and not merely voidable. [Sec. 2]

An **illegal** agreement is one which is **against the law** and not merely against public policy. [Sec. 23]

An agreement is said to be **unenforceable** if it is such that no suit can be brought on it in a Court of law. It may be a valid agreement, **but not capable of being enforced** in a court of law, **because of some technical defect**, *e.g.*, want of proper stamp duty or the reason of lack of registration, or because it is barred by the law of limitation. [Sec. 2]

#### Distinction between void and illegal agreements

An illegal agreement is always void, but a void agreement is not always illegal. An agreement is illegal because it is contrary to the law ; but a void agreement may be such because it is illegal or because though perfectly legal yet it does not have consideration, or because of a party to it is not competent to contract, *e.g.*, in the case of a minor or a lunatic.

In the case of an illegal agreement not only is the main agreement void, but all collateral agreements also are void. On the other hand, in a void agreement like a wager, which is not illegal (except in Bombay and other places where by reason of local acts it is expressly declared illegal), the main agreement is void but *collateral agreements are valid*.

**Agreement void when consideration and objects unlawful  
in part [Sec. 24]**

Where a portion of a single consideration for one or more objects or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void. [Sec. 24]

A promises to manage a lawful manufacture of indigo and an unlawful manufacture in other prohibited articles. B agrees to pay A for such management Rs. 500 a year. The **whole** agreement is void, because the object and the promise by A and the consideration for the promise by B are in part unlawful, and there is a **single consideration** for **both** the objects. But if B had promised to pay A Rs. 500 for the lawful manufacture of indigo and Rs. 500 for the illegal traffic in the other articles, the agreement would have been valid for the lawful manufacture of indigo, though not for the illegal traffic in the other articles. [See also sec. 57]

**Agreements void for uncertainty [Sec. 29]**

Agreements the meaning of which is not certain or capable of being made certain, are void under the Indian Contract Act. Thus if A agrees to sell to B 20 tons of oil, and does not state as to **what kind** of oil is to be supplied, the agreement is void because it is **uncertain**. But if, on the other hand, A is a dealer in cocoa-nut oil only and agrees to sell to B 20 tons of oil, from the very nature of A's business the agreement is capable of being made certain, or it can be said that the oil required ~~was~~ cocoa-nut oil. [Sec. 29]

## CHAPTER X.

### CONTINGENT CONTRACTS [Secs. 31-36]

A contingent contract is a contract in which the promisor promises to do or to abstain from doing something if some event collateral to such contract does or does not take place. [Sec. 31] A contracts to pay B Rs. 10,000, if B's property is burnt; this is a contingent contract. A contract of life insurance is a contingent contract. Upon the happening of the contingency, *e.g.*, the survival by a person to a stated age or upon his death the amount agreed to be paid in the policy becomes payable. A contract of marine or fire insurance is a contract of indemnity *i.e.*, a contract whereby the promisee is to be paid a reasonable compensation for damage suffered by him and for putting him in his original position. An agreement between A and B whereby A promises to pay to B what X will determine is a contingent contract. (Secretary of State v. Arathoon, 1882, 5 Mad. 174; Narain v. Aukhoy, 1885, 12 Cal. 152). An agreement to pay under a policy of insurance subject to the approval by the directors is also a contingent contract. (Braunstein v. Accidental Death Ins. Co. 31 L. J. Q. B. 17.) An agreement to pay a contractor for building or erecting conditional to a certificate of an architect or an engineer, is also a contingent contract. (Morgan v. Birnie, 9 Bing. 672; Worsley v. Wood, 6 T. R. 710; see also Bombay Burmah Trading Corporation v. Aga Mahomed, 1911, 34 Mad. 453.)

The Indian Contract Act provides :—

“Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible such contracts become void.” [Sec. 32]

“Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.” A agrees to pay to B a sum of Rs. 5,000 if a certain ship does not return. The ship is sunk. The contract can now be enforced because the ship cannot return. [Sec. 33]

If the future event on which the contract is made dependant is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies. A agrees to pay to B a sum of Rs. 10,000 if B marries C. C marries D. The marriage of B to C cannot now take-place, although it is possible that D may die and that C may afterwards be legally entitled to marry B. [Sec. 34]

Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void, if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible. A contingent contract to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired, and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen. A promises to pay to B a sum of Rs. 10,000, if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt or lost within the year. A promises to pay to B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or if it is lost or burnt within the year. [Sec. 35]

Under the Indian Contract Act, contingent contracts to do or not to do anything if an impossible event happens, are void, whether the impossibility of the event is known or not known to the parties to the agreement at the time it is made. A agrees to pay to B Rs. 10,000, if B will marry A's daughter C. Unknown to A or to B, the daughter had passed away at the time of the agreement. The agreement is void. A agrees to pay B Rs. 1,000, if two straight lines should enclose space. This agreement is void because it is to do an impossible thing. [Sec. 36]

An agreement to do an impossible thing is void. *Lex non cogit ad impossibilia*, i.e. the law does not recognize what is impossible. *Impossibilium nulla obligatio est*, i.e. there is no obligation to do what is impossible, or what is impossible does not create an obligation.

## CHAPTER XI

### PERFORMANCE OF CONTRACTS

#### **Contracts which must be performed ; Obligation of parties to Contracts**

The parties to a contract must either perform, or offer to perform, their promises, unless the performance is excused by consent or is dispensed with under the provisions of the Contract Act or under any other law for the time being in force. [Sec. 37]

As regards the legal representatives of the promisor, in the case of death of the promisor before the contract can be performed, the law is that they (the legal representatives) are, unless a contrary intention appears from the contract, bound by the promise, **provided the contract is not one involving personal skill or labour or personal factor such as volition.** [Sec. 37]

As a rule, a person who is not a party to the contract cannot sue upon it. We have already considered that in the Chapter dealing with 'Consideration'.

✓ A promises to deliver goods to B on a certain day on payment of Rs. 500. A dies before that date. A's legal representatives are bound to deliver the goods to B, and B is bound to pay Rs. 500 to A's legal representatives upon delivery of the goods or as otherwise agreed between A and B. But if A has not left any goods, A's legal representatives are not liable to buy the goods and then supply them to B, for the liability of the legal representatives is, as a rule, limited to the extent of the estate left by the deceased ; the legal representatives are, subject to a contract to the contrary (entered into by them), not liable personally ; the liability is that of the deceased's estate. ✓

A promises to paint a picture for B on a certain day at a certain price. A passes away before that day. The contract cannot be enforced by B against A's legal representatives, because it is a contract involving personal skill and labour, and the legal representatives cannot be expected to know painting ; they may not be even able to draw a straight line properly. *Actio personalis moritur cum persona*, i.e., a personal cause of action dies with the person concerned, is the legal maxim to express the law on the point very briefly.

The rule then is that the legal representatives of a deceased promisor are not liable to perform a contract involving personal skill or ability. (Graves v. Cohen, 1930, 46 T. L. R. 121). Further the liability, for the performance of an ordinary contract by the legal representatives, stands only to the extent of the assets left by the

deceased and recovered by the legal representatives, and the Court should inquire into the question of the extent of the assets so left. (Madheo Das v. Radha Mal, 1874, Punj. Rec. No. 65.)

### Assignment of Contracts

When a party to a contract transfers his right, title and interest in the contract to another person or other persons, he is said to assign his right under the contract. Assignment may be **by an act of the parties** or **by operation of the law**. It is said to be by the act of the parties when the parties themselves have made the assignment; but it is said to be by working of the law, when not the parties themselves, but the intervention of the law, brought about the assignment, *e.g.*, in the case of insolvency or death of the party to the contract. In the case of death the legal representatives come in; and in the case of insolvency the official assignee of the receiver is the assignee by operation of law.

A promisor cannot, without the promisee's consent, assign his **liabilities**, *i.e.*, he cannot transfer the **burden** under his contract to some other person; he cannot compel the promisee to accept performance through that other person; but with the consent of the other party, the assignment of even the burden can validly be made. Even with regard to assignment of a benefit under a contract, the law is that such assignment cannot be made without the consent of the other party, if the promise involves **personal factors**. (Griffith v. Tower Publishing Co., 1877, 1 Ch. 21; Torkington v. Magors, 1902, 2 K. B. 430.) If, on the other hand, the contract does not involve an element of personal skill or qualification, it can be assigned, even without the consent of the other party, so as to pass the benefit to another person or to other persons. (Jiwan v. Haji, 1903, 5 Bom. L. R. 373.) The assignee can then sue in his own name. (Tod v. Lakhmidas, 1892, 16 Bom. 441.) When the contract is still an executory contract the burden under it cannot be assigned without the consent of the other party. (Hansraj v. Nathoo, 1907, 9 Bom. L. R. 838; Jaffer Meher Ali v. Budge Budge Mills Co., 1906 33 Cal. 702.)

A contract for a future performance can, as a rule, be assigned; thus in a forward contract for purchase or sale of goods, the right and interest of the buyer can be assigned by him, in so far as it is an actionable claim (Hansraj v. Nathu, 9 Bom. L. R. 838), unless the benefit is associated with a burden or if there is a personal factor even though there is no liability. (Jaffer v. Budge Budge Jute Mills, 33 Cal. 732.)

The right of a seller to claim damages from the buyer for breach of contract cannot be assigned as such right is not an actionable claim. (Abu v. Chunder, 36 Cal. 345.)



**EFFECT OF REFUSAL TO ACCEPT OFFER OF PERFORMANCE**

**Meaning of tender and the Conditions under which a valid tender can be made [Sec. 38]**

When a person, who is legally bound to something under a contract, has informed the promisee of his readiness and willingness to perform his promise, he is said to have made a tender. A tender means an **attempted** performance. For the validity of a tender, it is essential that it must be **unconditional** and made at the **proper time** and **proper place** under such circumstances that the promisee can have a reasonable opportunity of determining that the tenderer is really able and willing to perform it there and then and to do the whole of what he is bound to do. If the promise is to deliver goods the promisee must be given reasonable opportunity of examining the goods offered and of satisfying himself that those are really what he had promised to supply. An offer or tender by the promisor to one of the several joint promisees has, under the Indian Contract Act the **same legal effect** as an offer made by the promisor to **all** the promisees.

In the case of an offer to pay money, a debtor must **continue always ready and willing to pay** up the amount of the debt. If he has already made a tender **validly**, and the tender is **wrongfully** rejected by the other party, and if a suit is brought against the tenderer, he can plead the tender provided he pays the money into Court. (*Haji Abdul v. Haji Noor Mahomed*, 1892, 16 Bom. 141; *Arunachallam v. Govindaswami*, 1933, 55 Mad. 458.) A mere offer by the tenderer to pay the amount due payable is not sufficient. There must be a readiness, willingness and ability to pay up the amount. (*Kanya v. Khettermoney*, 1879, 5 Cal. L. R. 105; *Lal Batcha v. Arocot Mudaliyar*, 1911, 34 Mad. 320.) The debtor must be ready and willing to pay the whole amount at one time, and not merely by instalments. (*Behari Lal v. Ram Ghulam*, 1902, 24 All. 461; 38 Mad. 959.) The tender must be in one's own current money (and not in some other currency or by a cheque or note), if it is to be a "**legal tender**" (*Jagat v. Naba Gopal*, 34 Cal. 305.)

Where the promise is to deliver goods, or pay money, **by instalments**, or where the Hindu Law rule of *dandupat* applies, a tender to pay by instalments is valid. The tender of money in the case of payment of a tender must be a tender in **current** money. A tender by cheque is not a legal tender; but if a cheque is accepted by the promisee he cannot after raise the contention that it was not a legal tender. (*Jagat Tarini v. Naba Gopal*, 1907, 34 Cal. 305).

The exact amount must be tendered. One cannot tender a smaller or even a larger amount than that required to be tendered.

Thus a tender of a rupee note, as and by way of payment of an anna fare, with a demand for the change, has been held to be not a proper but an invalid tender. (*Bireswar v. The Emperor*, 46 C. W. N. 550.)

The tender must be **unconditional** (*Laing v. Meader*, 1 C. & P. 257). The tender must not be before the due date ; it must be made at the proper time and place. (*Eshaqu Molla v. Abdul Bari*, 1904, 31 Cal. 183.) But a **tender** (which is **different** from **actual payment**) stands on a different footing from **actual payment**. In the case of a payment made by a debtor to one only of the several joint creditors, the effect of such payment has been differently decided by different High Courts. The Madras High Court has held that the actual payment made by the promisor to one of the several joint promisees frees the promisor from all further liabilities under the same promise. (*Barber Marana v. Ramana*, 1897, 20 Mad. 461). But the Calcutta, Bombay, Allahabad and Patna High Courts have taken a different view. According to these High Courts, the payment made by the promisor to one or more, but not to all, of the several joint promisees does not discharge the promisor from liability to the other promisees under the same promise. (*Jagat Tarini v. Naba Gopal*, 1907, 34 Cal. 305; *Satindra Nath v. Jatindra Nath*, 1927, 31 Cal. W. N. 374; *Sitaram v. Shridhar* 1903, 27 Bom. 292; *Sukh Lal v. Kanjman*, 1930, 28 All. L. J. 290 ; *Syed Abbas v. Misri Lal*, 56 I. C. 403.)

### **Consequence of non-performance by promisor [Sec. 39]**

When a promisor under a contract has refused to perform his promise under it, or has so disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he himself has expressly or impliedly waived his right and allowed the promise to continue. A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights every week for a period of two months, at the rate of Rs. 100 for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to terminate the contract; but if he allows her to sing again, he gives his acquiescence for the continuance of the contract and cannot then terminate it ; he can only claim compensation for the damage suffered by him by reason of her wilful absence. If her absence had been caused by circumstances beyond her control, *e.g.*, illness or loss of or any injury to her voice, she could not be held liable, for her absence, to any damages for any damage which the owner of the theatre may have suffered. [Sec. 39]

**FORM OF AN AGREEMENT FOR SALE OF BUSINESS WITH ITS GOODWILL**

STAMP

(See under Stamp  
Duties on  
Documents.)

THIS AGREEMENT made the.....day of.....19...., between....  
(name of the seller of the business) of.....(state the seller's address),  
a.....Inhabitant, hereinafter called "the Vendor" of the one part and  
.....(name of the purchaser of the business) of.....(purchaser's address)  
.....a.....Inhabitant, hereinafter called "the Vendee" of the  
other part

WHEREAS the Vendee is ready and willing to purchase from the Vendor  
the business done by the Vendor in the name and style of.....and having  
goodwill, patents, trade marks, trade names, copyrights and designs,

AND WHEREAS since the.....day of.....19....., the Vendor has  
been the exclusive owner of the said business and its goodwill and other rights,

AND WHEREAS the Vendor has been and is doing business in the name  
and style of.....

AND WHEREAS the said business has goodwill valued at.....rupees  
.....and other rights valued at rupees.....

AND WHEREAS the Vendor is desirous of selling to the Vendee the said  
business with its goodwill and all rights, properties, assets and effects.

**NOW THE PARTIES TO THIS AGREEMENT DO HEREBY AGREE  
AND COVENANT AS FOLLOWS:—**

1. The Vendor shall sell and the Vendee shall purchase the said business as a  
going concern, with its goodwill, assets and rights, including the sole right to use  
the name ".....", and with all the rights mentioned in the Schedule to  
this Agreement, and all debts and actionable claims due to the Vendor, along with  
all securities relating to the same and with all benefits attached to the securities  
for such debts, in connection with the said business and all rights and benefits  
arising from all contracts to which the Vendor is or may be entitled in connection  
with the said business.

2. In consideration of the said sale by the Vendor, the Vendee shall pay to  
the Vendor Rupees.....

3. The Vendor shall, from the date of this agreement till the execution of the deed of assignment, be deemed to be carrying on the said business on behalf of the Vendee and shall account to the Vendee in respect of the same and shall be entitled to be indemnified accordingly by the Vendee.

IN WITNESS WHEREOF the Vendor and the Vendee have set their hands and seals the day and the year first above written.

The Schedule above referred to :—

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Signed, sealed and delivered by the Vendor in the presence of .....	}	Signature of Vendor
		Signature of Witness to Vendor's signature.

Signed, sealed and delivered by the Vendee in the presence of .....	}	Signature of Vendee
		Signature of Witness to Vendee's signature.

**FORM OF DEED OF ASSIGNMENT****Stamp**

**THIS DEED OF ASSIGNMENT** made at.....(state place) this.....day of.....19 **BETWEEN** .....(name of party) of.....(state place)..... (state community).....inhabitant hereinafter called the "Assignor" of the one part **AND**.....(state name of the Assignee, *i.e.*, the person to whom the right and benefit or the burden under the contract, as the case may be, is assigned).....of..... (state his address), a.....(state community) inhabitant, hereinafter called the "Assignee" of the other part

**WHEREAS** the Assignor is entitled, under a contract dated the .....day of.....19 , made and entered into by him with one....., of....., doing business as a timber merchant, to certain articles in timber specified in the Schedule to that agreement, and for convenience and for the purposes of this assignment hereinafter also mentioned in the Schedule to this Deed of Assignment, to be delivered to him on the.....day of.... 1951, time of delivery being of the essence of the said contract, **AND WHEREAS** the Assignor is willing to assign and has agreed to sell the said articles of timber (which he is entitled to receive as abovesaid) to the Assignee, **AND WHEREAS** the Assignee has agreed to take over and buy the said articles in timber as per an agreement between him the Assignee and the Assignor and dated the.....day of 19 , for the consideration mentioned therein,

**NOW THIS INDENTURE WITNESSETH** that in pursuance of the abovesaid intentions and designs of the Assignor and Assignee the Assignor **DOTH HEREBY ASSIGN** to the Assignee for the consideration hereinbefore mentioned, the right to the delivery of the goods hereinbefore mentioned on the date hereinbefore mentioned from the seller hereinbefore mentioned **AND** the Assignee hereby

takes the said benefit, *i.e.* the said right under the said contract to receive the said goods at the said date.

IN WITNESS WHEREOF the Assignor and the Assignee have hereunto set their hand and seals the day and the year first above-written.

**The Schedule above referred to :—**

All those articles of timber agreed to be delivered by.....  
to the Assignor, on.....day of.....19 , being  
specifically as follows :—

1. One piece of.....
2. Seven pieces of beams of.....(state dimensions, etc.)  
.....  
.....
3. ....

Signed, sealed and delivered by }  
the withinnamed.....in the }  
presence of

Signature of Assignor  
and  
his seal

.....Witness to the Assignor's signature.

Signed, sealed and delivered by the }  
withinnamed.....in the pre- }  
sence of

Signature of Assignee.

.....Witness to the Assignee's signature

**FORM OF ASSIGNMENT OF ACTIONABLE CLAIM.**

I,.....(name of assignor), of.....(address) hereby assign all my rights, title and interests under.....(state, with particulars, of the chose in action) to.....(name of assignee) of.....(assignee's address).

Dated the.....day of.....19.....

Signature of Assignor.

**FORM OF BOND GIVEN TO AN EMPLOYER FOR FAITHFUL SERVICE**

BE IT KNOWN TO ALL THOSE CONCERNED by these Presents, that we the undersigned, i.e.....(name of employee) of.....(employee's address), hereinafter called the Employee, and.....(name of the Guarantor) of.....(guarantor's address), hereinafter called the Guarantor, are bound to.....Company, Limited.....registered in....., hereinafter called the Employer, in the sum of rupees.....to be paid to the Employer, or its representatives or assigns, for which payment we hereby bind ourselves and each of us, our and each of our heirs, executors, administrators, jointly and severally.

Dated this.....day of.....19.....

Signature of Employee in the  
presence of .....

Signature of Guarantor in the  
presence of .....

THE CONDITION of the above-written bond is that if the said Employee shall duly and faithfully discharge his duties as such Employee, i.e. as.....(state the Employee's work or position with the Employer), as under the terms and conditions hereinafter provided in the Schedule hereto, and the said Guarantor shall at all times hereafter keep the said Employers, their representatives/assignees, etc., indemnified against all such costs, expenses, losses, damage as the said Employers may incur by reason of their having taken the said Employee into their employment, or as may result by mismanagement on the part of the Employee, or by his negligence, mischief, fraud or embezzlement, then the above-written bond shall become void; otherwise the same shall remain in force.

THE SCHEDULE ABOVE REFERRED TO :—

---

Signature of Employee in the  
presence of .....

Signature of the Guarantor in the  
presence of .....

**Anticipatory breach of contract [Sec. 39]**

Anticipatory breach of contract involves that the promisor intimates, **before** the due date of performance, to the promisee that he would not perform his promise at the appointed date. In such case the promisee can either treat the intimation as a breach of contract and repudiate the contract and sue the promisor for damages for breach of contract, or can (if he so desires) wait till the due date of performance and, then, if at the due date of performance the promisor does not keep his promise, sue him for damages. If the promisee prefers to wait till the due date of performance, he keeps the promise open for the benefit of both the promisee and the promisor, and does not treat the anticipatory breach as a breach. In such a case, *i.e.*, where the promisee has chosen to wait, and thus the breach has been condoned, the contract having been kept open for the benefit of and performance by the parties, if there is a frustration of it before the due date of performance, the promisee will have to bear the consequences of such frustration, and the promisor shall be deemed discharged. (*Frost v. Knight*, L. R. 7 Ex. 111; *Hochster v. De La Tour*, 2. E. and B. 678; *Phul Chand v. Jugal Kishore*, 1927, 8 Lah. 501.) If an event takes place, or an act is passed by the legislature, which prohibits the performance of the promise under the agreement, the promisor is not liable for non-performance at the due date, though he had made the anticipatory breach (before the date of performance), because that breach was condoned by the promisee and cannot now be relied on by the promisee.

**Persons by whom promise should be performed [Secs. 40, 41]**

The contract between the parties determines the person or persons by whom the promise should be performed. If the contract shows that the promise should be performed by the promisor himself, and not by any one else, the promise can be performed by the promisor alone. But if the contract does not show an intention that the promise should be performed by the promisor alone, the promisor or his agent or representative may employ a competent person to perform the promise. Contracts of personal service or skill can only be performed by the promisor. A promises to paint a picture for B. The picture can only be painted by A. But if A promises to pay B a sum of money, A may perform that promise either by personally paying the money to B or by having it paid through another person; and if A dies before the time of payment comes, A's legal representatives are bound to perform the promise out of the estate left by A, and subject only to the extent of the estate, without any personal liability (unless incurred.) [Sec. 40]

If the promisee accepts the performance of the promise by a person other than the promisor, he cannot afterwards enforce it against the promisor, for the promise has been validly discharged. [Sec. 41]



**Devolution of joint liabilities [Secs. 42-45]**

The Indian Contract Act provides that when two or more persons have made a joint promise, then unless a *contrary intention* appears from the contract, all such joint promisors must, during their lives, and after the death of any one of them his representatives jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all of them jointly, must perform the promise. The rules mentioned in the Indian Contract Act deviate from the rules of the English law regarding devolution of benefit and liability under a joint contract (*Luxmidas v. Purshotum*, 1882, 6 Bom. 700). In Indian law after the death of a joint promisor the whole liability is not thrown on the surviving joint promisors, but the law here makes the legal representatives of the deceased promisor or promisors, subject to the extent of the assets left by the deceased, liable equally with the survivor or survivors. [Sec. 42]

Under the Indian Contract Act when two or more persons make a joint promise, the promisee may, in the absence of an agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise. [Sec. 43] Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a *contrary intention* appears from the contract. If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear, in equal shares, the loss arising from the default. A surety can recover from the principal debtor payments made by him (the surety) for the principal debtor. [Sec. 43]

A, B and C jointly promise to pay X Rs. 3,000. X may compel A, B and C jointly, or A or B or C separately, or any two of them, to pay him the whole amount of Rs. 3,000. (*Raghunath Das v. Baleswar Prasad*, 1928, 7 Pat. 353.)

A, B and C jointly make promise to pay X a sum of Rs. 3,000. C is made to pay the whole amount. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive Rs. 500 from A's estate and Rs. 1,250 from B, because B and C must bear in equal shares, the loss caused by A's inability and default.

A, B, and C are under a joint promise to pay D Rs. 3,000. C cannot pay anything, and A is compelled to pay the whole amount. A can receive Rs. 1,500 from B.

A, B and C are under a joint promise to pay D Rs. 3,000, A and B, being only sureties for C who fails to pay. A and B are compelled to pay the whole amount. They are entitled to recover the whole amount from C, because C is the principal debtor liable to pay the whole amount of Rs. 3,000. If he could not pay and the sureties A and B had to pay, they can now claim re-imbursement from C.

Under the English Law joint promisors should all be sued jointly for a breach of contract ; but in India under the Indian Contract Act, the promisee may, in the absence of an express agreement to the contrary, sue any one or more of the joint promisors for the whole amount. [Sec. 43] (*Luxmidas v. Purshotam*, 1882, 6 Bom. 700). This applies to mortgagors, joint tenants, joint promisors of a promissory note, partners and others. (*Raghunath Das v. Baleswar Prasad*, 1928, 7 Pat. 353 ; *Askari v. Radhe Rao*, 1900, 22 All. 307).

Under the law in England if a judgment is obtained against one or more of joint promisors no judgement again on the same debt or same breach of contract can be obtained against the other joint promisors. (*King v. Hoare*, 1844, 13 M. & W. 194). As regards the law in India on this point the judicial decisions are in conflict. The Madras and Allahabad High Courts refuse to apply the rule in *King v. Hoare*. (*Ramanjulu v. Aravamudu*, 1910, 33 Mad. 317 ; *Askari v. Radhe*, 1900, 22 All. 307) differed from. The Calcutta High Court has held that the rule of English Law is applicable and that a judgment obtained against one or two or more joint promisors would bar the right to a judgment for the same debt or contract against the other joint promisors. (*Bhusan v. Rajendra*, 1947, Cal. (A.L.R.) 11 ; *Rajendralal*, 1878, 3 Cal. 353). In *Shivlal v. Birdichand*, 1917, 19 Bom. L. R. 370, and other Bombay cases it has been held by the Bombay High Court that the plaintiff is free to get a decree against one co-contractor, if he does not wish to or will not join in the suit the other co-contractors. But he cannot file separate actions against them. In the case of a contract by a firm, the plaintiff in a suit is entitled to proceed against such members or partners of the firm as he wishes. (*Laxmidas v. Purshotam*, 1882, 6 Bom. 700). In such a case the plaintiff can sue the firm or all the partners of the firm or such partners as he wishes to sue.

Where two or more persons have made a joint promise, a release by the promisee of one of such promisors does not, under the Indian law, discharge the other joint promisor or joint promisors. The joint promisor discharged from liability by the promisee is liable to contribute in favour of the other joint promisor or joint promisors. [Sec. 44] But the English law provides to the contrary. Under the English law, if the promisee discharges one of the several joint promisors, such discharge acts as a discharge of all the joint promisors, because under the English law the liability of a joint promisor is joint, and not joint and several as in India. (*Arjun Lal v. Banbehari*, A. I. R. 1944 Cal. 328.)

When a person has made a promise to two or more persons jointly, the right to claim performance of the promise rests with all the joint promisees during their joint lives, and after the death of any of them with the representatives of such deceased promisee

jointly with the survivor or survivors, and after the death of the survivors also, with the representatives of all jointly. This is subject to a contrary intention appearing from the contract. Unless all the promisors, or the legal representatives, as the case may be, join as plaintiffs in the suit the suit would be thrown out by reason of non-joinder of parties. A, in consideration of Rs. 5,000, lent to him by B and C, promises them jointly to repay to them Rs. 5,000 with interest on a specified day. B passes away. The right to claim the performance of the promise now rests with the legal representatives of B jointly with C during C's life time, and after that with the representatives of B and C jointly. (*Satindra Nath v. Jatindra Nath*, 1927, 31 Cal. W. N. 374; *Siluvaimuthu v. Muhammad*, 1926, 51 Mad. L. J. 648; *Gharfoor Khan v. Kalandari Begam*, 1911, 33 All. 327.) If a joint promisee does not wish to join as plaintiff in the suit, or if he is colluding with the promisor, the other joint promisee or promisees can bring a suit against the promisor and make the joint promisee concerned (who refused to be a plaintiff) a defendant formally. [Sec. 45]

In the case of a surviving partner the law is that he can sue in his own name for the recovery of a debt due to the firm without joining the representatives of the deceased partner or partners; this is the view taken by the Bombay, Allahabad, Madras and Rangoon High Courts. (*Ujar Sen v. Lachmi Chand*, 1910, 32 All. 638; *Motilal v. Ghelabhai*, 1893, 17 Bom. 91; *Vaidyanatha v. Chinnasami*, 1894, 17 Mad. 108; *Daw Ywet v. Ko Tha*, 1929, 7 Rang. 806). But the Lahore High Court and the Calcutta High Court have taken a different view, *i.e.*, the representatives of a deceased partner must be made parties to a suit by the surviving partner or partners for a debt due to the firm. (*Monmohan v. Bidhu Bhusan*, 1918, 48 I. C. 309; 9 Cal. L. J. 331, 335; *Hari Singh v. Karam Chand*, 1927, 8 Lah. 1.)

With regard to a joint Hindu Family, the karta (the manager) can sue without making the junior members of the family parties to the suit. (*Kishan Prasad v. Har Narain*, 33 All. 272).

### **Ways in which a contract can be discharged.**

**A contract may be put an end to in any of the following ways :—**

- (1) By mutual agreement ;
- (2) By performance of the promise or by tender ;
- (3) By frustration or impossibility ;
- (4) By operation of the law, *e.g.*, Insolvency or death ;
- (5) By breach made by one party thus discharging the other party unless the breach is expressly or impliedly condoned and the contract is kept open for performance ;

- (6) By a material alteration without the consent of the other party ;
- (7) By novatio or merger.

### Novatio [Sec. 62]

Novatio (novation) means forming a **new** contract in place of the existing one. A novation may or may not be a merger. If it is a merger the parties substantially remain the same, but in place of the existing liability a higher liability is substituted, *e.g.*, a simple debt substituted by a mortgage debt ; it is called a novatio amounting to a merger. When the parties change, and a new contract altogether is substituted in place of the existing one, the transaction is a novation, without being a merger. All merger is novatio ; but all novatio is not merger.

### Accord and Satisfaction. [Sec. 63]

An agreement whereby a promisee accepts of the promisor a **smaller sum** or a **lesser fulfilment in full satisfaction** of the obligation, is called an **accord**. Thus if A owes X Rs. 1,000, and A now agrees to pay Rs. 500 to X in **full satisfaction** *i.e.* of the **entire** debt of Rs. 1,000, A is not liable any longer on the original debt.

When A **actually fulfils** his new promise (under the accord to pay Rs. 500), *i.e.* when A actually pays X the sum of Rs. 500, the **payment** is called satisfaction.

The original debt is discharged only by actual payment, *i.e.* by satisfaction. (British Russian Gazette v. Associated Newspapers, 1933, 2 K. B. 616.)

### Time and place of performance [Secs. 46-50]

When by a contract, a promisor has agreed to perform his promise, without application by the promisee, and the time for performance of the promise is not specified, the agreement must be performed within a reasonable time from the making of it. As to what is a reasonable time will depend upon the facts of the particular case. [Sec. 46] (Dorasinga v. Arunachalam, 1900, 23 Mad. 441; Bengal Coal Co. v. Homee, 1900, 24 Bom. 97 ; Tewkebury Gas Co., 1911, 2 Ch. 279.)

When a promise is to be performed on a specified day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual business hours on the specified day and at the place the promise ought to be performed. A promises to deliver goods at B's warehouse on the first of January. On that day A brings the goods to

the warehouse, but after the usual business hours for the closing of the warehouse. A has not performed the promise properly. In the absence of any custom to the contrary delivery of goods may be necessitated even on Sundays. (*Lalchand v. John Kersten*, 1891, 15 Bom. 338). [Sec. 47]

When a promise is to be performed on a specified day, and the promisor has not agreed to perform it without application by the promisee, it is the duty of the promisee to apply for the performance at a proper place and within usual business hours. As to what is proper time and place is, in each case, a question of fact. [Sec. 48]

When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, the promisor must apply to the promisee asking for appointment of a reasonable place for the performance of the promise, and then must perform it at such place. [Sec. 49] A undertakes to deliver to B 100 maunds of jute on a fixed day. A must apply to B asking for appointment of a reasonable place where he can deliver the jute, and then must deliver the same at such appointed place. But where by implication or import, one can see what or where the place of delivery is, the Contract Act will have no application (*Soniram v. Tata Co. Ltd.*, 1927, 5 Rang. 451) In the case of a pakka adat dealing it is the duty of the promisor to pay the money at the place where his constituent resides. (*Kedarnal v. Surajmal*, 1909, 33 Bom. 364). If the contract says that the place of delivery will be mentioned after sometime, the choice of the place lies with the buyer. (*Grenon v. Lachmi Narain*, 1897, 24 Cal. 8.)

The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions. A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance. This amounts to a payment by A and B respectively of the sums which they owed to each other. [Sec. 50]

A owes B Rs. 2,000. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as part payment.

A desires B, who owes him Rs. 1,000 to send him a note to the extent of Rs. 1,000 by registered post. The debt is discharged as soon as B sends the note by registered post.

### **Performance of reciprocal promises [Secs. 51-54]**

† Reciprocal promises are promises in which each party agrees to do something for the other party either simultaneously or conditionally.¶ There is reciprocity of rights and obligations under the promises. Thus if A and B agree that B shall deliver certain commodity to A and that A shall pay the price upon delivery of that commodity, there are reciprocal promises made under that contract.

A need not pay the price unless B delivers the goods, and B need not deliver the goods unless A pays the price. (*Pandurang v. Dadabhoy*, 1902, 26 Bom. 643 ; *Chengravelu v. Venkanna*, 1925, 49 Mad. L. J. 300 ; *Jaggunath v. Beck*, 2 N. W. 60). Where on the day of the performance of the promise the defendant refuses to perform it or absconds and closes his place of business without leaving any agent or any other person to represent him there, actual tender on the part of the other party is not necessary and the other party can show readiness and willingness to perform his part of the promise. (*Dayabhai v. Dullabhram*, 1871, 8 B. H. C. R. App. 133). [Sec. 51]

When the order in which reciprocal promises are to be performed is expressly fixed by the contract itself, such promises shall be performed in that order ; and where the order is not expressly fixed by the contract, the promise shall be performed in the order in which the nature of the transaction requires. Thus A and B contract that A shall build a house for B at a fixed price. A's promise must be performed before he can demand the price. And if A and B contract that A shall make over his stock-in-trade to B at a mentioned price and that B would give security for the payment of the money, A's promise need not be performed until the security is given, for the very nature of the transaction requires that A should have security before he delivers up his stock. [Sec. 52]

If a contract contains reciprocal promises, and one of the parties to the contract prevents the other party from performing his promise, the contract becomes voidable at the option of the party so prevented ; and he is entitled to compensation by the other party for any loss which he may sustain in consequence of the non-performance of the contract. A and B contract that B shall do a certain piece of work for A for Rs. 500. B is ready and willing to do that work but A prevents him from doing so. The contract is voidable at the option of B, because though he is ready and willing to perform it he is not allowed to do so. If B wishes to rescind the contract, he can do so and he is also entitled to recover from A damages or compensation for any loss which he may have incurred by the non-performance of the contract through the wrongful act of A. [Sec. 53]

If a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed, till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim performance of the reciprocal promise, and must compensate the other party for any loss which such other party may sustain by the non-performance of the contract. Thus if A hires a ship from B to take and convey from one place to another a cargo to be provided by him (A) in consideration of B being given a certain freight, and A does not provide any cargo for the ship, A cannot demand performance of B's promise and must pay damages to B for the loss which B sustains by reason of non-performance of the promise. [Sec. 54]

**Effect of failure to perform at the fixed time the promise under the contract, the time of performance being of the essence of the contract [Sec. 55]**

Whenever **time is of the essence of the promise**, failure to perform the whole of the promise at the stipulated time entitles the other party to **avoid** the agreement ; but if time is not of the essence of the contract, failure by a party to perform his contract by the stipulated time does not enable or entitle the other party to put an end to the whole of the promise but entitles him only to bring a suit for compensation for any damage suffered by him through the failure of the other party. The determination of the question whether time is, in a given contract, of the essence of the contract or not, is a question of fact dependant upon the circumstances of the particular case. In the absence of a contract to the contrary, time regarding the **delivery** of goods is deemed to be of the essence of the contract in every **mercantile** transaction ; but time regarding the **payment of the price** for the goods delivered is not deemed to be of the essence of the contract, even in a mercantile transaction, unless expressly or impliedly it is so intended by the parties under the contract (*e.g.* price has to be paid at the time of delivery).

If in the case of a contract avoidable on account of the failure of the promisor to perform his promise at the agreed time, the promisee accepts performance of such promise at any time after the time agreed, the promisee cannot claim compensation for any damage caused by the non-performance of the promise at the agreed time, **unless at the time of such acceptance by the promisee the promisee gives notice** to the promisor that he would in spite of such acceptance sue him for damages for the damage suffered by him. The mere fact that an agreement mentions that the promise will be performed at a stipulated date does not necessarily involve or mean that time is of the essence of the contract and that delivery could only be made at the agreed time. The fixing of the day for delivery may merely be meant to secure performance of the promise within a reasonable or stipulated time, or it may be otherwise. It is for the Court to determine, after consideration of all the surrounding facts, whether time was or was not of the essence of the contract. (*Singh v. Singh*, 1895, 6 Cal. L. J. 176 ; *Bhagvant v. Appaji*, 1916, 18 Bom. L. R. 803 ; *Kishen Prasad v. Behar*, 1926, 24 All. L. J. 210). It has been held in a series of cases that in mercantile transactions time of delivery of the goods is of the essence of the contract. (*Baliram v. Gudiyatam*, 1925, 49 Mad. L. J. 200 ; *Delhi Cloth Co. v. Kanhiya*, 1913, Punj. Rec. No. 80 ; *Bhudarchandra v. Betts*, 1915, 22 Cal. L. J. 566.) In spite of time being of the essence of the contract, the parties may, if they so desire, mutually agree that there will be an extension of the time for performance of the promise under the contract. The promisee, in such a case, allows and

extends the period of time for the performance of the promise ; and he cannot sue for non-performance at the original date but can sue for non-performance at the later date by virtue of the extended period of time. (*Habibullah v. Bird & Co.*, 1920, 43 All. 257 P.C. ; *Kamal Krishna v. Chaturbhuj A. I. R.*, 1925, Cal. 324 ; *Haji Fakir v. Shaik Abdulla*, 1888, 12 Bom. 658). But though the promisee may have kept the contract capable of performance even after the day of breach, and may have made repeated demands (after the breach) on the promisor to perform the contract and the promisor may have promised (even after the date of breach) to perform the promise and then failed to perform it, it **cannot** be said that the parties had thereby **extended** the date of breach to the **later** date of ultimate failure of the promisor, in the absence of a clear agreement to that effect. (*Anandram v. Bholaram*, 47 Bom. L. R. 719).

With regard to contracts for sale of land it has been held, in *Jamshed v. Burjorji*, 1916, 40 Bom. 289 (P.C.) that when a contract does not specify that time is of the essence of its performance, the Court would consider that the contract is to be completed or performed within a reasonable time from the making thereof.

### **Promise to do an impossible act [Sec. 56]**

When a person has promised to do something which he knew, or could have known had he exercised reasonable diligence, to be something impossible or unlawful, and the promisee did not know that the promisor was making an impossible or unlawful promise, the promisor must compensate the promisee for any loss which the promisee sustains through the non-performance of the promise. A promises to marry B though he is already married to C, and is forbidden by the law to which he is subject to practice polygamy. A is liable to compensate B for any damage or loss caused to her by the non-performance of his promise, unless B herself knew that A was a married man at the time he made the promise.

An agreement to do an act which is impossible in itself is void. Thus if A agrees to pay B a sum of Rs. 1,000 if two parallel straight lines could enclose a space, or if A agrees with B to discover treasure by magic, the agreement is void because it is to do an impossible thing.

A contract to do an act, which **after** the contract is made becomes impossible, or (by reason of some event which the promisor could not prevent) becomes unlawful, becomes void when the act becomes impossible or unlawful. A and B contract to marry each other. Before the time fixed for the marriage, A becomes insane. The contract becomes void. If A contracts to take some cargo for B to a



foreign port, and A's Government afterwards declares war against the country in which the port is situated, the contract becomes void when the war is declared. If A contracts to act at a theatre for six months in consideration of a sum of Rs. 1,000 paid by B the manager of the theatre, and if A becomes too ill to act at the theatre, the contract to act at the theatre becomes incapable of performance on the occasion of her illness.

A contract is discharged by impossibility of performance. The Latin maxims are : *Lex non cogit ad impossibilia*, i.e., the law does not recognise or compel what is impossible; and *Impossibilium nulla obligatio est*, i.e., what is impossible does not create an obligation. If the contract is not capable of performance, the parties to it are, as a rule, discharged from their promises, under the doctrine of **frustration** of contract. Frustration of contract means and involves that without his fault a party to the contract becomes incapable of performing his promise under the contract, because of the operation of the law making performance unlawful or because of illness making the performance impossible or because of some such other event beyond his (the promisor's) control. (*Metropolitan Water Board v. Dick Kerr*, 1917, 2 K. B. 1). In order that a person or a party to a contract can be excused by reason of frustration, it has to be shown to the satisfaction of the Court that the act or promise became actually impossible of performance. Mere difficulty in doing or procuring the doing of the promise would not amount to impossibility. Thus where in a contract to carry goods from Bombay to Antwerp (Amsterdam), shipment to be made in September, war broke out and the defendant could not perform the contract, because freight from Bombay to Antwerp was not procurable in September except at exorbitant rates, it was held that there was **no impossibility** of the performance of the contract within the meaning of the Indian Contract Act and that the defendant had committed breach. (*Karl Ettinger v. Chagandas and Co.*, 40 Bom. 301). The contract could still have been performed (in spite of the intervening difficulty). Even the cause of strikes by employees, and the stoppage of work resulting in such strike, cannot be regarded as sufficient to render a contract **impossible** of performance; the contract remains valid, because a passing or a surmountable difficulty cannot be regarded as an impossibility. (*Hare v. Secretary of State*, 52 Bom. 142.)

Where there was a contract for the sale of dhoties manufactured by certain specified mills, and the seller could only deliver a part of the agreed quantity, owing to the mills failing to manufacture or deliver the rest to the defendant who had agreed to sell them to the plaintiff, it was held that the plaintiff, who was to buy from the defendant, could recover damages from the defendant, because there was no impossibility or frustration within the meaning of the Indian Contract Act. (*Hurnandrai v. Pragdas*, 1923, 47 Bom. 344 P. C.)

In another important case—*Hari v. Secretary of State*, 1928, 52 Bom. 142,—a lessee of salt-pans was held liable for failure to repair the salt-pans or working them, and it was held that the mere ground of a strike of workmen was no excuse so as to bring the case under the Indian Contract.

### Effect of war on contracts

An agreement entered into with an alien, **before** the breaking out of war with the alien's State, is a contract valid *ab initio*, but after the breaking out of the war it becomes incapable of performance; in other words, the performance of the contract, after the breaking out a war, is **suspended** till the hostilities end, if the other party to the contract is the subject of a State at war. The contract does not become void, but is suspended as long as the war lasts, unless the very nature of the contract is such that the performance of it after a time, *i.e.*, after the war gets over, remains no longer necessary, desirable or fruitful in which case the contract gets **ended** (and not merely suspended). If an agreement is entered into, **in time of war**, *i.e.*, **after** the hostilities have begun with an alien's state, it is void *ab initio*, unless a fiat (sanction) of the Central Government was taken before the contract was entered into. In this connection see: *Wilford v. Jamshetji*, 1917, 41 Bom. 390; *Soorthingjee v. Mahomed*, 1917, 32 Mad. L. J. 146; *Espositov. Bowden*, 1857, 7 El. & Bl. 763; *Marshal & Co. v. Naginchand*, 1918, 42 Bom. 473; *Madhoram v. Sett*, 1918, 45 Cal. 28).

### Refund of money in cases of impossibility [Sec. 65]

Under the English law no refund is allowed in the case of an agreement which becomes avoided by reason of frustration. In *Krell v. Henry*, 1903, 2 K. B. 740, the defendant had contracted to hire a house for watching a coronation procession, and had paid the deposit for the same. But the procession was not held on the day on which it was to be held. The plaintiff sued for the balance; it was held that he could not get the same because it was a case of frustration, there having been no fault of the other party for the non-performance of the contract. But the law in India is different. Under Sec. 65 of the Indian Contract Act it is open to the Courts to grant a refund of the money already paid under a contract which is frustrated. (*Devi Dayal v. Bains Ram*, 1919, Punj. Rec. No. 42.) In that case, however, refund was not allowed because the circumstances of the case were such that the Court did not think it fit to do so; but the principle was laid down by the Court that in a fit case it is open to the Court to order the refund of the money because the Indian Contract Act provides that a person who has received some benefit under an agreement, which is discovered to be void or under a contract which is frustrated, is liable to restore it to the other party or to compensate him.

## CHAPTER XII

### APPROPRIATION OF PAYMENT IN CASE OF TWO OR MORE DISTINCT AND SEPARATE DEBTS.

#### Rule in Clayton's case with modifications

[Secs. 59—61]

When a debtor makes a payment, he may appropriate it to any debt he pleases, and the creditor must apply it accordingly. The latin maxim is: *Quicquid solvitur, solvitur secundum modum solventis*, i.e., whatever is paid is paid (or is to be applied) according to the mode (laid down by the payer.) In India the Rule in Clayton's case has been followed subject to the provisions of the Indian Contract Act. Where a debtor owes several distinct debts to one person, and makes a payment to him either with express intimation or under circumstances implying that the payment is to be applied to the discharge of a particular debt, the payment, if accepted, must be applied accordingly. In other words, the debtor can say to the creditor how the payment should be applied in the discharge of the debts. If, for example, A owes B Rs. 1,000, Rs. 3,000 and Rs. 5,000, and makes a payment of say Rs. 500, it is open to him to say to the creditor how Rs. 500 should be applied. He can say that Rs. 500 should be applied to the payment of the first debt, or if he likes, to the third debt, or if he so chooses, he may inform the creditor that Rs. 500 should be applied towards payment of the second debt. It is for the debtor to make a choice in appropriation. But if the debtor does not show how the payment made by him should be appropriated, then the circumstances of the case can allow an inference to be made as to how the amount paid should be applied. For example, if A, who owes B Rs. 1,000, Rs. 3,000 and Rs. 5,000 pays a sum of Rs. 1,000, then by implication it can be said that A sent the money towards the payment of his first debt of Rs. 1,000. But where there is **only one** debt payable by instalments, this rule does not apply, and the debtor cannot say that the payment must be applied to a particular instalment. (Fazal Husain v. Jiwan Ali, 1906, 3 All. L. J. 430 ; Harkinsondas v. Nariman, 1927, 29 Bom. L. R. 950). [Sec. 59]

Where the debtor has not made his choice and has not stated how the payment made by him should be applied, and where the circumstances of the case do not imply how the payment is to be applied, the creditor shall have the right of appropriation with regard to all **lawful** debts actually due and payable to him by the debtor, **whether time-barred or not**. [Sec. 60] The creditor is entitled to exercise this right after the debtor has been given the opportunity to exercise his right and has failed to do so. See also Dashrathi v. Khondkar, 1928, 55 Cal. 624. Where the creditor has not intimated to the

debtor how he has applied or appropriated any particular payment by the debtor, the creditor is entitled to change the appropriation to some other debt (*Imperial Bank of India v. Avanasai*, 1930, 53 Mad. 826.) The creditor cannot appropriate any payment made by the debtor to an illegal or void debt, though he can appropriate with regard to any unenforceable or time barred debt. (*Bitari Ram v. Kanji Singh*, 1915, 19 Cal. W. N. 237,. Once the creditor has made an appropriation, he is bound by it and cannot afterwards make a different appropriation, if he has already communicated the fact of the appropriation of the payment to the debtor, unless the debtor sanctions the re-appropriation. (*Clayton's case*, 1816, 1 Mr. 572; *Shah v. Lalchand*, 42 Bom. L.R. 640 ; *Mohomed Jan v. Ganga Bishun*, 1911, 38 Cal. 537). It is open to a creditor to appropriate at any time (*i.e.*, up to the time of trial or hearing of the case. (*Kunjamohan v. Karunakanta*, 1933, 60 Cal. 1265 ; *Shah v. Lal Chand*, 1940, 67 I. A. 160 ; 1914, 38 Bom. 255 ; *Munisami v. Perumal*, 1924, 37 Mad. L. J. 367.) The principle mentioned in the Indian Contract Act is applicable to appropriation of payment towards interest also. In the case of an appropriation made by a creditor the creditor is said to have appropriated first towards interest and then towards principal, when the money is due both for principal and interest. (*Malik v. Rahim*, A. I. R. 1922, Pat. 369 ; *Ramlingam v. Subrahmanya*, 1926, 52 Mad. L. J. 612 ; *Biswanath v. Sameswar*, 1917, 21 Cal. W. N. 1055). It is however open to the debtor when he makes a payment to stipulate that the same is to be applied first towards the principal and in such a case the creditor must, if he accepts payment, be prepared to abide by the debtor's appropriation, or else (*i.e.* if he does not wish to abide by such appropriation) he must send back the money ; if the creditor accepts the money he would be bound by the appropriation made by the debtor. (*Nemi Chand v. Radha Kishen*, 1921, 48 Cal. 839 P.C.)

When neither the debtor nor the creditor makes any appropriation, the payment shall be applied in the discharge of the lawful debts **in the order of time in which they took place**, whether they are or are not barred by the law of limitation. And if the debts are of equal standing, the payment shall be applied in the discharge of each proportionately. Sec. 61 (*Mooneappah v. Vencatarayadoo*, 1870, 6 M. H. C. 32). This is the Rule in *Clayton's case*, reported in 1816, 1 Mer. 608. Where there are two debts, one of which arises on an illegal consideration and one on a lawful consideration and a payment is made which is not appropriated by the debtor or by the creditor, it can be appropriated to the lawful debt alone (and not to the unlawful one) *Wright v. Laing*, 3 B. & C. 165.

## CHAPTER XIII

### EFFECT OF ALTERATION IN CONTRACT

[Sec. 62]

An alteration in a contract may be (1) a **material** alteration, or (2) an **immaterial** alteration. Whenever the alteration is such that it affects or alters, in a significant manner, the rights and liabilities of a party or parties to the contract, it is said to be a material alteration. (*Aldous v. Cornwall*, 1888, L. R. 3 Q. B. 513). Thus, an alteration of the amount payable under a negotiable instrument, like a cheque, promissory note or bill of exchange, is a material alteration. (*Scholified v. Earl of Londesborough*, 1896 A. C. 314). Where a party is added to the parties to a bond, by the person suing on the bond, the addition gives rise to a material alteration. (*Gour Chunder v. Prasanna*, 1906, 33 Cal. 812 ; *Ramayyar v. Shanmugam*, 1892, 15 Mad. 70). See also *Gardner v. Walsh*, 1855, 5 E. & B. 83. The alteration of the rate of interest payable under a promissory note is also a material alteration, although the alteration may lead to what the law would ~~not~~ allow on the ground of it being in the nature of a penalty. (*Odeychand v. Bhaskar*, 1882, 6 Bom. 371.) See also *Warrington v. Early*, 1853, 23 L. J. Q. B. 47. An alteration of the date of the instrument is a material alteration. *Outhwaite v. Luntley*, 1815, 4 Camp. 179. Where the time of payment of the instrument is altered, e.g., where a bill payable three months after date is altered so that it becomes payable three months after sight, the alteration affects substantially the rights and liabilities of the parties. (*Long v. Moore*, 1790, 3 Esp. 155.) An alteration of the place of payment is also a material alteration. (*Tidmarsh v. Grover*, 1813, 1 M. & S. 735). An alteration is not material, if it is of such a type that it does not in any material manner affect the rights and liabilities of the parties to it. Where in a mortgage deed, the name of a party was corrected, it was held that that was not a material alteration, because it was only with the purpose of making a correction. *Howgate's Contract*, 1902, 1 Ch. 451 ; *Lowe v. Fox*, 12 A. C. 206.) Where the signature of an attesting witness was added to a bond not requiring attestation, it was held that the alteration was not a material one because the addition was superfluous. (*Venkatesh*, 1890, 15 Bom. 44.) So also the correction of a clerical error or an accidental slip or omission is not the making of any material alteration. Thus the true date at which a deed was executed may be put on it even after it is executed, provided there has been no extension of the time of suing. (*Govindasami v. Kuppusami*, 1889, 12 Mad. 239.) See also *Brutt v. Pickard*, 1824, Ry. & M. 37.) So also where words e.g., "Ten days would be allowed for demurrage", are added marginally, there is no material alteration, because what is written in the margin cannot be considered a part of the document, and such

addition therefore is redundant and cannot affect anybody's right or liability under the contract. (*Suffel v. Bank of England* 9 Q. B. D., 555 ; *Kanto Nath*, 1877, 3 Cal. 220. See also 1886, 9 Mad. 399(F.B.) and 1903, 25 All. 580.)

If an alteration in a contract is a material alteration, and if it has been effected with the consent of the other party or parties to the contract, the contract remains valid, and a suit can lie on it. Where parties to bills of exchange mutually agreed to have the dates of payment postponed, it was held that the material alteration had been validly made. (*Pestonji & Co. v. Cox & Co.*, 52 Bom. 589.) But where the consent of the other party or parties is not taken to the alteration, the alteration, if material, renders, as a rule, the whole contract avoidable at the instance of the party or parties whose consent had not been obtained. As a rule, a material alteration discharges the other party or other parties from liability under the contract, unless the alteration had been effected by consent of the parties. But an immaterial alteration does not affect an otherwise valid contract. (*Lowe v. Fox*, 12 A. C. 206.) Except where an alteration has been necessitated by accident, inadvertence or mistake, the alteration must be effected while the document is in possession of a party to the contract. (*Pattison v. Luckily*, L. R. 10 Ex. 330 ; *Wilkinson v. Johnson*, 3 B. & C. 428.) The nature of the instrument, the manner in which the rights or liabilities of the party concerned are affected, will determine whether an alteration would put an end to the contract so as to free the aggrieved party or whether the alteration is immaterial.

In the following cases a material alteration will not affect the contract (because in these cases it is authorised by the law) :—

- (1) **Making** an **inchoate** instrument a **complete** negotiable instrument ;
- (2) **Conversion** of an indorsement in blank into one in full ;
- (3) Acceptance of a **qualified acceptance** of a bill of exchange;
- (4) **Crossing** an uncrossed cheque.

A material alteration will not invalidate an instrument if it is made **before** the instrument is issued or **before** it has become available or usable against a party to it. (*Downes v. Richardson* 1822, 5 B. & Ald. 674.)

**Obligation of person who received benefit under void agreement or under contract that later became void [Sec. 65]**

When an agreement has been found to be void or when a contract becomes void subsequently, any person who has received benefit under such agreement or contract must restore that benefit or make compensation for such benefit received, to the person from whom he received the benefit. This, however, does not apply to the case of a minor or a lunatic ; the minor is not liable to refund the benefit unless he is bringing a suit for the enforcement of a right (in which case as a condition precedent to the enforcement of his suit the court would call upon him to restore the benefit received to the defendant). [Sec. 65]

## CHAPTER XIV

### QUASI CONTRACTS

[Secs. 68-72]

A **quasi contract** is not a contract ; it is a transaction which is deemed, under the law, to be like a contract. There is no offer or acceptance. The transaction is such that the law says that there is a liability to pay for the benefit received, the liability not being contractual but quasi contractual. A quasi contract is an “as if” contract ; it is **like a contract, without being a contract**. This is on the ground of equity.

#### Cases of Quasi Contracts

(1) When an **incapable** person, like a minor or a lunatic, or when any one, whom the minor or the lunatic is legally bound to support, is supplied by a **trader** with **necessaries**, which looking to the status and position in life of the minor or the lunatic, as the case may be, can really be regarded as necessaries, **actually needed when supplied**, the trader is entitled to be **compensated** from the **property, if any**, of the minor or the lunatic, as the case may be, by payment of a **reasonable value**. The minor or the lunatic is **not personally liable**. His property alone, if any, is liable. If any price was agreed to be paid by the minor or the lunatic to the trader, the latter cannot legally recover the agreed price, **for** there can be **no agreement** by an incapable person. The trader can recover **quantum valebant**. (Nash v. Inman, 1908, 2 K. B. 1 ; Vishwanath v. Shiam, 34 All. L. J. 1120.) [Sec. 68]

By payment quantum valebant is meant the payment of a reasonable sum of money for goods supplied. If the minor or lunatic is already possessed of the kind of goods supplied, the supply cannot be called that of “necessaries,” and the trader cannot recover anything. (Ryder v. Wombwell, 1868 L. R. 4 Ex. 32.)

(2) A person who is **interested** in the payment of money, which another person is bound to pay, and who therefore pays it **to protect his own interest**, is entitled to be **reimbursed** by the person failing to make the payment which he was bound to make. X holds on lease some land belonging to Y a zamindar. The zamindar has failed to pay the revenue payable by him to the Government in respect of that land which is therefore advertised for sale by the Government. Now X, to protect his own lease and to prevent the sale by the Government, pays to the Government the sum which Y, the zamindar, is bound to pay. Y, the zamindar, is bound to make good to X, the tenant, the amount paid by him (the tenant). (See Hazari Lal v. Naurang Lal, 28 All. L. J. 1103.) [Sec. 69]



It is sufficient that the payer was interested in making the payment at the time the payment was made. [Dakhina v. Saroda, 21 C. 142 (P.C.)], provided the payment was made bona fide. (Munni Bibi v. Nath, 1932, 54 All. 140 ; Gordhanlal v. Surajmalji, 26 Bom. 504).

(3) When a person lawfully does something for another person, or lawfully delivers something to him, **not intending to do so gratuitously**, and such other person enjoys the benefit of the act or of the delivery, he (such other person) is bound to compensate the person delivering the goods or doing the act, or, in the alternative, restore the thing so done or goods so delivered. A, a merchant, leaves **by mistake** a bag of rice at B's house. A intended to leave it at C's house, but by mistake he left the bag on B's premises. B **consumes** the goods. B is liable to pay A for the rice *quantum valebant* ; otherwise he ought not to have consumed the same. A saves B's property from being burnt down. A cannot claim compensation from B, if the circumstances show that he intended to act gratuitously, *i.e.*, without a hope for a reward. [Sec. 70]

To constitute an obligation to repay the money received or to compensate for the benefit got, it must be shown that there is an obligation to repay. A **voluntary** payment would not create an obligation to repayment. (Tuhul v. Biseswar, 1875, 2 I. A.131). A person who managed the property of his wife and the sisters of his wife, expecting remuneration and under the impression that he would be entitled to remuneration was held entitled to claim a reasonable sum for the management of the property ; he had not intended to manage the property voluntarily. (Palanivelu v. Neelawathi, 39 Bom. L. R. 720 (P.C.).) But the other party **must have actually been benefited** by the act which might have been done *suo moto*. (Ranglal v. Shankar, 1923, 2 Pat. 890).

(4) A person who finds goods belonging to another person and keeps them with himself is liable like a bailee of such goods. He can keep such goods till the true owner comes to claim them and pay his (the finder's) charges reasonably incurred in keeping the goods in their original condition. If the true owner wrongfully refuses to compensate the finder for preserving the goods found, the finder can exercise a lien over such goods, *i.e.*, he can detain or retain such goods till a reasonable compensation is made by the true owner. But if the owner refuses to compensate the finder, the finder **has no right to bring a suit** for such compensation. If the owner cannot, after reasonable diligence, be found, or if he refuses to pay the lawful charges of the finder, the finder may sell the goods, if the thing is in danger of perishing (physically or even economically, *i.e.*, capable of losing the greater part of its value) or when the lawful charges of the finder in respect of the thing found amount to two-

thirds of the value of the thing. Looking to the nature and value of the goods, the finder of goods must take reasonable care like a bailee in keeping the goods in good condition. The more valuable the goods, the greater the degree of the care required. [Sec. 71]

The finder of goods is entitled to possess the goods as against every person except the true owner. Thus where Hollins found a diamond in a shop and gave it to the shopkeeper to keep it till the owner could claim it, and in spite of extensive notifications in newspapers the true owner could not be traced, Hollins asked the shopkeeper to return to him the diamond (to which he was entitled because no one else claimed it). The shopkeeper wrongfully refused to give back the diamond to Hollins who then sued the shopkeeper. It was held that the shopkeeper was bound to return the diamond to Hollins who could possess it because the true owner was not forthcoming. (Hollins v. Fowler, 7 H. L. 757).

(5) A person, to whom money has been paid or some article delivered by mistake or under pressure, must repay or return it. [Sec. 72]

A and B owe Rs. 100 to C, the debt being a joint obligation. A pays the full amount to C. B, who as unaware of the fact of the payment by A to C, pays over again the one hundred rupees to C. C must repay the amount to B, because B had paid C under a mistake.

A railway official refuses to deliver up certain goods to the consignee except upon payment of a charge which really is higher than the lawful charge. The consignee pays, **under protest**, the extra charge, because otherwise he is not given his goods. He can recover from the Railway Company the charges which he had been made to pay under pressure.

### THE DOCTRINE OF SUING ON A QUANTUM MERUIT

By the doctrine of *quantum meruit* (as much as is merited), is meant that a person who has done, at the request of another person, some work for, or delivered goods to, him, is entitled to a reasonable payment for the same, and that other person should pay him the amount merited.

An action on *quantum meruit* lies in cases of contracts implied in law or of unenforceable contracts or when the other side has committed a breach of contract or when there is a stipulation to pay by instalments or when there is slight deviation from the terms of the contract.

When a party to a contract is entitled to sue for a **reasonable sum** of money for goods supplied or services rendered, he is said to be entitled to claim *quantum meruit*, i.e., for the quantity supplied and value deserved or for a reasonable remuneration for the portion of the work done or services rendered.

Where no remuneration has been fixed for the work done, a reasonable amount can be claimed. (*Scott v. Pattison*, 1923, 2 K. B. 723.)

When a contract fails by reason of a formal defect, *e.g.*, want of registration, or want of writing, or of lack of capacity to contract, or, when the contract is *ultra vires* (*e.g.*, in the case of a company's directors), the other party to the contract can nevertheless sue on a *quantum meruit*, **if he can show that the defendant received some benefit by his act or services.** (*Ellis v. Cannons Ltd.*, 2 K. B. 403.)

When a contract is for the doing of something or for the delivery of an agreed quantity of goods, the remuneration or the price, as the case may be, cannot be claimed **unless the whole of the work is completed, the entire service rendered or the whole of the goods delivered**, because the contract is an **entire one and not divisible**. If the Court were, in such a case, to allow a suit on *quantum meruit*, it would mean that the Court would be or is making a new contract for the parties in substitution of the original contract—something which the parties have not themselves done. This is the **rule in *Cutter v. Powell***, (1795, 6 T. R. 320). In that case, *viz.*, *Cutter v. Powell*, (1795, 6 T. R. 320), a sailor was employed on a **lump** sum on a voyage from Jamaica to Liverpool. He was to be paid thirty guineas **on the arrival of the ship at Liverpool, if he continued his duty till then**. More than two-thirds of the voyage got accomplished, and the sailor did his work faithfully and well; he then passed away before the whole of the voyage could be completed. It was held by the Court that the executors of the deceased sailor were not entitled to claim anything *quantum meruit*, *i.e.*, for as much as was deserved by the sailor for more than two-thirds of the work actually done. If the Court allowed remuneration *quantum meruit*, for the portion of the work done, the Court would be substituting a new contract which the parties had never intended. But supposing the sailor had not passed away, and supposing he, though prepared to carry on with his work for the whole of the voyage, was wrongfully dismissed by the master of the ship, then could the sailor have recovered *quantum meruit* for the work done by him? Yes, the sailor could then have recovered not only *quantum meruit*, but could also have claimed damages for the wrongful dismissal and the damage suffered thereby. For wrongful breach of contract, the aggrieved party could recover *quantum meruit*, **because the contract was wrongfully terminated by the defendant without there having been any fault on the part of the plaintiff to justify such dismissal.** (*Mayor v. Pyne*, 3 Bing. 288.)

In *Sumpter v. Hedges*, (1898, 1 Q. B. 673), a builder was promised by the defendant a sum of money as a **lump** sum, **upon the completion** by him of certain structures on the land of the defendant. After doing some work the builder committed breach of contract by

abandoning the work, with the result that the defendant then had to complete the structures himself. It was held by the Court, in a suit (on the transaction) by the builder, that the builder was not entitled to claim *quantum meruit*, because he himself had wrongfully abandoned the contract, and there was no new contract in substitution of the original one whereby he could recover *quantum meruit*, and the Court could not make such a contract for the parties. It was held further that the mere fact of the defendant taking possession of the buildings and completing the structures himself could not raise any reason to infer any such agreement.

In *Appleby v. Meyers* (1867, L. R. 2 C. P. at p. 661), it was held that *unless the whole* of the work is completed, a suit cannot be brought by the promisee on *quantum meruit*, i.e., for what is merited for the work done. Appleby had agreed for a specific sum of money to erect machinery on Meyer's premises. After a part of the work was done, the premises got burnt down, without the fault or default of either party. Held that Appleby could not recover anything for the portion of the work done, as under the contract he was to be paid *only on the completion of the work*.

In *Forman v. The Liddesdale* (1900, A. C. 190), the contract provided for stipulated work at a *lump* sum. A ship-repairer agreed for a lump sum to repair a ship, but did the work in a way different from that agreed upon. And he did more work than what under the contract he had to do. It was held that, in the absence of any new contract or any variance of the original contract (which had remained quite intact), he could not recover anything.

When the plaintiff was ready and willing to complete the work but the defendant, without any cause or excuse (wrongfully) prevented the plaintiff from carrying on with the work after a part of the work was done, the plaintiff could claim *quantum meruit* for the work done by him. (*Planche v. Colburn*, 1831, 8 Bing. 14.) The plaintiff agreed with the defendants to write for them a treatise to be published in the "Juvenile Library" for a fee of £ 100. But the Library had to be given up because it did not prove to be a success. So the plaintiff, who had written a part of the treatise and would have gone ahead with it had the Library not been given up, sued to recover *quantum meruit* for the work actually done, and which had to be abandoned without any fault of his. It was held that he was entitled to recover *quantum meruit*.

Where a contract allows remuneration for partial performance or for part of the services rendered, an action *quantum meruit* would lie for the work done or services rendered. (*Cutter v. Powell*, 1795, 6 T. R. 320).

If the work done is **not materially different** (but **very slightly different**) from the work prescribed under the contract, the party responsible for the slight non-compliance would not completely lose his remuneration. (Dakin v. Lee, 1916, 1 K. B. 566.)

### SUING QUANTUM VALEBANT

By suing *quantum valebant* is meant suing for the value of the goods supplied. When, for example, a trader supplies an incapable person, *e.g.*, a minor or a lunatic, or a member of his family **with necessaries** of life, which, looking to the position and status of the incapable person, can be properly regarded as necessaries to him or to any member of his family, the trader concerned can recover from the property, if any, of the incapable person, a reasonable sum of money, looking to the value of the goods at the time of their supply. (Nash v. Inman, 1908, 2 K. B. 1.) The liability (out of the estate, if any) is quasi-contractual (not contractual), and is to pay **quantum valebant**, *i.e.*, to pay a reasonable sum for the value of the goods supplied—what is valued or worth for the quantity of goods supplied.

## CHAPTER XV

### CONTRACTS OF INDEMNITY AND OF GUARANTEE

#### Contracts of Indemnity [Secs. 124, 125]

A contract of indemnity is a contract by which the promisor agrees to save the other party, namely the promisee, from loss caused to him (the promisee) either by the conduct of the promisor himself or due to the conduct of some other person. A contract of marine or fire insurance is a contract of indemnity, *i.e.*, it is a contract whereby the insurer agrees to put the insured in *status quo* (in his original position) by compensating him for the loss suffered by him. [Sec. 124]

In a contract of indemnity the promisee can recover from the promisor compensation for damage suffered by him by being compelled to pay in any suit in respect of any matter to which the promise applies, including all costs which he may be compelled to pay in any such suit, provided the promisee did not exceed the scope of his powers allowed him by the promisor. [Sec. 125]

The object of the agreement must be lawful. (Smith v. Clinton and Harris, 1908, 90 L. T. 840.)

In a contract of indemnity there are two parties—the indemnifier and the indemnified—and the liability of the indemnifier is principal liability.

#### Contract of Guarantee or Suretyship

A contract of guarantee or suretyship is a contract whereby a person known as guarantor or surety agrees to answer and be liable for the default of another person known as the principal debtor. (Ellis v. Kerr, 1910, 1 Ch. 529.) There are three parties to a contract of guarantee—the creditor, *i.e.*, the promisee, the principal debtor, *i.e.*, the promisor, and the guarantor or the surety. [Sec. 126]

Under the English law, a guarantee must be in writing or there must be some collateral document, note or memorandum to evidence the existence of such contract. But under the Indian Law, a guarantee may be oral or written. (Barkat-un-nisa v. Mahbub Ali, 1920, 42 All. 70.) Such a contract (of guarantee) may be express or implied. (Das v. Secretary of State, 28 All. L. J. 1217.)

#### Distinction between Contract of Indemnity and Contract of Guarantee

(1) In a contract of indemnity there are two parties to the contract, *viz.*, the indemnifier and the indemnified. But, on the other

hand, in a contract of guarantee there are **three** parties to the contract, *viz.*, the promisee (creditor), promisor (principal debtor) and the guarantor (surety).

(2) In a contract of indemnity the liability of the indemnifier is **primary**; in a contract of guarantee, on the other hand, the liability of the guarantor is **secondary**. If the principal debtor does not satisfy his obligation under his contract, the guarantor would be liable for the default.

Under the English law, a contract of guarantee must be in writing or else there must be some memorandum, note or collateral writing to witness the existence of the contract. (This is so under the Statute of Frauds). But an indemnity does not require any such writing: it may be oral.

In India neither a contract of guarantee nor one of indemnity requires any writing. Even a guarantee, in Indian Law, may be oral or written. (*Barkat-un-nisa v. Mahbub Ali*, 1920, 42 All. 70.) So this third point of distinction is unknown to, and does not arise at all in, the Indian law.

### Consideration in a Contract of Guarantee [Sec. 127]

Anything done, or any promise made, for the benefit of the principal debtor, is to be regarded as sufficient or good consideration to the surety for the giving of the guarantee. (*Jogadindra v. Nath*, 1904, 31 Cal. 242.)

### Extent of Liability of Surety [Sec. 128]

The liability of the surety is co-extensive with that of the principal debtor, unless the contract otherwise provides. A creditor is not bound to first exhaust his remedy against the principal debtor; he can sue the surety without suing the principal debtor or without making the principal debtor co-defendant. (*Jagannath v. Shivanarayan*, 42 Bom. L. R. 451; *Panioty v. Dwarka Mohun*, 4 Cal. L. Rep. 145; *Depak Datt v. Secretary of State*, 1929, Lah. 393). When the principal debtor is a minor, the surety alone is liable. (*Kashiba v. Shripat*, 1894, 19 Bom. 697; *Indar Singh v. Thakor Singh*, 1921, 2 Lah. 207.)

### Continuing Guarantee [Sec. 129]

A guarantee extending to **two or more** transactions is said to be a **continuing** guarantee. When, on the other hand, a guarantee is limited to a **single** transaction, it is called a **simple** guarantee. A agrees to be liable to B if X does not pay the debt due by X to B. This is a simple guarantee, because it is limited to the particular

transaction of payment of the debt, and nothing more than that. On the other hand, where A agrees to be liable for a period of time, *e.g.*, six months, for any defaults which might be made by, say, a rent-collector employed by the creditor (promisee-landlord) the guarantee would be regarded as a continuing guarantee.

It has been held, in *Sen v. Bank of Bengal*, 32 C. L. J. 223 (P.C.), and in *Myingyam Municipality v. Maung Po*, 1930, 8 Rang. 320, that a guarantee given for the fidelity of a person appointed to a post, *e.g.*, that of a Khajanchi in a bank, is not a continuing guarantee.

### How is a continuing guarantee terminated ?

A continuing guarantee may be determined in any one or more of the following ways :—

(1) By the surety giving notice to the creditor that he ceases to be a surety ; [such notice would be valid as regards **future** transactions, *i.e.*, transactions with regard to which no liability has accrued before the giving of the notice.] [Sec. 130]

(2) By death of the surety (unless the contract provides to the contrary), with regard to all transactions **after** the death. In India, it is not necessary that the creditor must have notice of the death; in England, such notice is essential. When the consideration is indivisible, death cannot revoke the continuing guarantee, and the estate remains liable for future transactions also. (*Gopal Singh v. Bawani Prasad*, 10 All. 531.) [Sec. 131]

(3) By any **variance** in the contract of guarantee, without the consent of the guarantor, between the principal debtor and the creditor. [Sec. 133]

(4) By any act or omission on the part of the creditor, which is inconsistent with the rights of the guarantor, and which impairs the eventual remedies of the guarantor against the principal debtor. [Sec. 139]

(5) By novatio, *i.e.*, substitution of a new agreement for the existing one.

### When is a surety discharged from liability under a contract of guarantee ?

(1) A surety is discharged from liability under a contract of guarantee after he has given notice, as regards future transactions, of revocation of the suretyship. [Sec. 130] But a surety bond given in case of a guardian of a minor's property cannot be discharged by such notice. The majority of the High Courts have so held it, because



otherwise great inconvenience would be caused. (*Subroya v. Ragamal*, 1905, 28 Mad. 161 ; *Bai Somi v. Chokshi*, 19 Bom. 245). But the Calcutta High Court has taken a different view and has allowed the surety the power to revoke, as to future transactions, a continuing guarantee by the giving of notice. See *Narain v. Ful Kumari*, 1902, 29 Cal. 68.)

(2) The death of the surety discharges him from all liability under the guarantee. His property would, however, be liable under the guarantee, if there was a contract to that effect. [Sec. 131]

(3) Any variation in the terms of the contract between the principal debtor and the creditor, without the consent of the guarantor, discharges the guarantor as regards all transactions taking place **subsequent** to the variation. [*Ramanund v. Soondar*, 1878, 4 Cal. 331 (P.C.)]. See also *Polak v. Everett*, 1 Q. B. D. 669 ; and *Holme v. Brunskill*, 3 Q. B. D. 495 : [Sec. 133]

(4) The principal debtor is released or discharged by the creditor; that discharges the surety also ; further, any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor, discharges the guarantor also. [Sec. 134] (*Cragoe v. Jones*, 1873, L. R. 8 Ex. 81.) But as held by the Calcutta, Bombay, Madras and Lahore High Courts, the **mere omission** on the part of the creditor to sue the principal debtor within the period of limitation cannot be regarded as an omission which discharges the debtor. (*Kanai v. Jotindra*, 36 Cal. 626 ; *Nathabhai v. Ranchhodlal*, 39 Bom. 52 ; *Subramania v. Gopala*, 33 Mad. 308 ; *Nur Din v. Ditta*, A. I. R. 1932 Lah. 419). The Privy Council has held this view in *Mahant Singh v. U. Ba Yi*, 1939, 66 I. A. 198). [Sec. 134]

(5) When a creditor makes settlement with, or promises to give time to, the principal debtor, or promises not to sue the principal debtor, **by a contract between the creditor and the principal debtor**, the surety is discharged from liability under the guarantee, unless he (the surety) assents to such new contract between the creditor and the debtor. [Sec. 135]

When a contract to give time to the principal debtor is made by a creditor **with a third person, and not with the principal debtor**, the guarantor is **not** discharged. C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged. [Sec. 136]

(6) **Mere forbearance** by the creditor to sue the principal debtor or to enforce any remedy against the principal debtor does not, in the absence of a contract to the contrary, discharge the guarantor. [Sec. 137] A owes to C a debt guaranteed by B. The debt

becomes payable. C does not sue A for a year after the debt has become payable. B, the guarantor, is not discharged. (See also the Privy Council case : *Mahant Singh v. U Ba Yi*, 1939, 66 I. A. 198.) [Sec. 137].

(7) Under the English Law, a release by the creditor of one or more of the co-sureties discharges the other sureties, provided the other sureties are joint co-sureties but not severally liable sureties. Under the Indian Law, a release by the creditor of one or more of the co-sureties does not discharge the other co-sureties because of the liability being joint as also several. But the surety so released from his liability is not released from his responsibilities by way of contribution to the other co-sureties. [Sec. 138]

(8) If the creditor does any act which is not consistent with the rights of the surety, or if he omits to do any act which he is bound to do for the benefit of the surety, and **if thereby the eventual remedy of the guarantor against the principal debtor is impaired**, the guarantor is discharged. [Sec. 139]

(9) If the creditor loses or parts with any security which at the time of the contract the debtor had given in favour of the creditor the surety is discharged to the extent of the value of the security, unless the surety consented to the release of such security by the creditor in favour of the debtor. It is immaterial whether the surety is aware of such security or not. [Sec. 141] (*Goverdhandas v. Bank of Bengal*, 15 Bom. 48.) [Sec. 141]

### **Rights of guarantor against the debtor [Sec. 140]**

When the guarantor has paid the creditor in the case of failure by the debtor, the guarantor is subrogated to (*i.e.* gets) all the rights which the creditor had against the principal debtor. The guarantor can recover from the debtor what he had been made to pay to the creditor, unless the debtor be a minor. [Sec. 140]. He can also claim interest on the amount paid by him to the creditor. (*Nadar Bux's case*, see *Punj. Rec.* 48 of 1881.) But where the surety paid a smaller amount under an accord and satisfaction, he can recover from the debtor that amount only. (*Reed v. Norris*, 2 Bing. 361.)

### **Contract of guarantee quasi uberrima fidei [Sec. 143]**

It is the **duty** of the creditor to reveal to the person wishing to be a guarantor, all **material** circumstances regarding the guarantee. A's clerk, X, has defaulted to the extent of Rs. 1,000, and A has called upon his clerk X to produce security or a surety for his duly accounting in the future. The clerk procures one Y as a guarantor. The creditor **does not disclose beforehand** to the guarantor the fact of the previous default by the clerk. The guarantee is not binding because under the Indian Contract Act the law casts on the creditor the duty

to inform the guarantor of every material fact which would go in influencing the guarantor to consent or not to consent in being a guarantor. (*Railton v. Mathews*, 10 Cal. & F. 934; *Secretary of State v. Nilamekam*, 6 Mad. 406.)

The surety is discharged even if the omission has not been made with a fraudulent intention. (*London G. O. Co. Ltd.*, 1912, 2 K. B. 72.)

### Contribution between Co-sureties [Secs. 146, 147]

Where two or more persons are co-sureties for the same debt or obligation, the sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt or that part of it which remains unpaid by the principal debtor. A, B, and C are sureties to D for the sum of Rs. 6,000 lent to P. P makes default. A, B, and C are liable each as between themselves to pay Rs. 2,000. [Sec. 146] Co-sureties who are liable in different amounts have to pay equally as far as the limits of their respective obligations allow. A, B, and C as sureties for X enter into three several bonds, each to a maximum amount. A is liable to a maximum of Rs. 10,000, B to a maximum of Rs. 20,000 and C to a maximum of Rs. 40,000. X makes default to the extent of Rs. 60,000. A is liable to pay Rs. 10,000; B is liable to pay Rs. 20,000 and C is liable to pay Rs. 30,000, because each guarantor is liable to pay equally **subject to the maximum liability undertaken by him.** Each is liable equally for default of Rs. 60,000; so each would be liable to pay one-third of Rs. 60,000, there being 3 guarantors. Each is liable, therefore, to pay Rs. 20,000; but as A's maximum liability is Rs. 10,000, he cannot be called upon to pay Rs. 20,000; A is liable to the extent of Rs. 10,000 only. B is liable to the full extent, *i.e.* Rs. 20,000. That makes to the sum of Rs. 30,000. So C will have to bear the remaining Rs. 30,000; as C's maximum liability undertaken by him is Rs. 40,000, he is liable to pay the Rs. 30,000. [Sec. 147.]

## CHAPTER XVI

### CONTRACTS OF BAILMENT

#### Meaning of 'Bailment', 'Bailor', and 'Bailee'

A bailment is a transaction whereby one person delivers goods to another person for some specific purpose to be returned or otherwise disposed of according to the instructions of the person delivering them, after the completion of the purpose. The person so depositing the goods is said to be the bailor; the person with whom the goods are deposited is the bailee; and transaction itself is known as a bailment. [Sec. 148].

The essential of a bailment is **delivery of goods** (not current money) for a **temporary** purpose. (Gangaram v. The Crown, 1943, Nag. 436; Icha v. Natha, 13 Bom. 338.)

#### Different kinds of bailments

- (1) Safe deposit, *i.e.*, a bailment of goods by one person with another for safe custody.
- (2) Hire, *i.e.*, a bailment for the benefit of and the use by the bailee, in return for a payment of money;
- (3) Commodatum, *i.e.*, a bailment *ex gratia*, *e.g.*, to a friend without consideration—without any charge.
- (4) Pledge or Pawn, *i.e.*, a bailment, by a borrower of money, with the lender as security for the repayment of the amount of the loan and the interest thereon.
- (5) Carriage, *i.e.*, a bailment with a view that the goods may be carried from one place to another.
- (6) Bailment for repairs to the goods bailed.

#### Bailor's duty to disclose all faults in the goods bailed [Sec. 150]

It is the duty of the bailor to disclose to the bailee all faults in the goods bailed. If the bailment is without consideration, (a **commodatum**), it is the duty of the bailor to disclose to the bailee all material defects, in the goods bailed, of which the bailor is **aware**; otherwise, for any loss or damage suffered by the bailee, the bailee can recover compensation from the bailor. In the case of bailment without consideration, if the bailor was not aware of the defects in his goods, the bailor is not liable for any loss or damage suffered by the bailee. In the case, on the other hand, of a bailment for consideration, (a hire), the bailor is liable for any loss or damage

suffered by the bailee by reason of any defect in the goods bailed, **even though the bailor was not aware of such defects**, because a person who deals in goods of the type and gives them out on hire, must have the goods examined beforehand and see that the same are not defective. [Sec. 150].

### **Degree of care required to be taken by a bailee [Sec. 151]**

The bailee must take as much care of the goods bailed with him as a reasonable man of ordinary prudence would, considering the nature and value of the goods under the circumstances, take of his own goods of the same bulk, value and quantity as the goods bailed. The bailee must not think that because the goods belong to another person, he can neglect them. He must take as much care of them as he would if the goods were his own. The more valuable the goods the greater is the degree of care required. All the circumstances surrounding the particular case must be taken into consideration in arriving at a determination of the question of the degree of care to be taken by the bailee. [Sec. 151]

If the goods bailed get stolen, the bailee cannot be held liable, in the absence of negligence. (Singh v. Nath, 1937, 12 Luck. 128.)

A jeweller at Lahore **used to send** for repairs, **by uninsured** post, articles of jewellery to a Calcutta repairer. Everything went on alright, till on the occasion in question the jeweller sent again **by ordinary uninsured** post some articles of jewellery for repairs. The repairer repaired the goods and sent back the same from Calcutta according to the **usual** practice of sending the goods **uninsured**. The parcel got lost during transit. The Court held that, looking to all the circumstances and the **habit** established between the parties, it could be said that the requisite amount of care was taken, though the jewels were sent back, after the repairs, uninsured. (Boseck & Co., 1906 P. 70.)

Under the Common Law of England, a bailee was liable, under the rule of absolute liability, *i.e.*, whether guilty of negligence or not. But now both in England and in India, the liability of the bailee is limited to cases of wilful wrongful doing and negligence. If additional or special liability is sought to be imposed upon the bailee, it must be so imposed by agreement to that effect. A bailee is not an insurer of the safety of the goods deposited with him.

With regard to a public hotel-keeper or inn-keeper, the law in England is that such hotel-keeper or inn-keeper is liable for loss of or damage to the goods of a lodger even without the inn-keeper or the hotel-keeper having been negligent. (Calye's case, 1854, 1 Sm. L. C. 131.) See also Wright v. Anderson 1909, 1 K. B. 209. But in India, a hotel-keeper or an inn-keeper is liable only if negligence is proved against him or an act of wilful wrong-doing is shown but not otherwise. (Jan v. Cameron, 1922, 44 All. 735.)

As regards Common Carriers, the law is that a common carrier, who is a person (other than the Government), doing the business of carrying goods for hire from one place to another, **indiscriminately**, is liable only in the case of negligence or wilful wrong doing, but not otherwise. Railways are governed by the Railways Act, and Common Carriers by the Carriers Act. The liability of a carrier is limited to cases of negligence. With regard to carriers by land, such carriers are not liable for loss or injury to certain specified articles over Rs. 300 in value, if carried by railway, such as : gold, silver, jewellery, precious metals, watches, negotiable instruments, china, pottery, silk, platinum, irridium, radium, rhodium, osmium, unless at the time such goods were delivered to the carrier the nature and value of such goods had been declared by the consignor and an additional charge paid to the carrier.

In cases other than those of railway carriers, the goods must be worth more than hundred rupees, if this law is to apply. The Carrier's Act limits, in India, the liability of a common carrier for loss of or damage to goods delivered to him to be carried, and exceeding in value Rs. 300 (or Rs. 100 in cases other than of railway carriers), of the description contained in the schedule to the Carrier's Act, unless the person delivering such goods or his agent shall have expressly declared beforehand to such carrier, or his agent, the value and description of such goods. If the value and description have not been so declared at the time of consignment, the carrier cannot be held liable even in spite of negligence on his, or his agent's, or servant's part ; but in cases of wilful wrong doing by the carrier, or his agent or servant, there would be liability in spite of the consignor not having declared the value and nature of such goods.

In the Schedule to the Act are mentioned goods which must be declared, if the value exceeds Rs. 300. They are as follows :—

- (1) gold and silver, coined or uncoined, manufactured or unmanufactured ;
- (2) plated articles ;
- (3) cloths and tissue and lace, of which gold or silver forms part, not being the uniform or part of the uniform of an officer, soldier, sailor, police-officer, or a member of the Auxiliary Force, India, or of any public officer, British or foreign, entitled to wear uniform ;
- (4) pearls, precious stones, jewellery and trinkets ;
- (5) watches, clocks and time-pieces of any description ;
- (6) government securities ;
- (7) government stamps ;
- (8) bills of exchange, hundis, promissory notes, bank-notes and orders or other securities for payment of money ;
- (9) maps, writings, and title-deeds ;

- (10) paintings, engravings, lithographs, photographs, carvings, sculpture and other works of art ;
- (11) art pottery, and articles made of glass, china or marble ;
- (12) silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials ;
- (13) shawls ;
- (14) laces and furs ;
- (15) opium ;
- (16) ivory, ebony, coral and sandalwood ;
- (17) musk, sandalwood oil and other essential oils used in the preparation of itr or other perfume ;
- (18) musical and scientific instruments ;
- (19) any article of special value which the Railway Authority may, by notification in the Official Gazette, add to this schedule ;
- (20) narcotic preparations of hemp ;
- (21) jade, jade-stone and amber ;
- (22) crude India-rubber ;
- (23) feathers ;
- (24) itr ;
- (25) zahir mohra khatai ;
- (26) gooroochand or gooroochandani ;
- (27) cinematographic films and apparatus ;
- (28) platinum, iridium, palladium, osmium, ruthenium and rhodium ; and
- (29) agarwood\*.

Under the Carriage of Goods By Sea Act, there is provision with regard to declaration of goods exceeding £100 in value per package or unit or equivalent of that sum in other currency, and the carrier is not liable unless the nature and value of such goods has been declared before shipment and included in the bill of lading or unless there is an act of wilful wrong doing.

With regard to railways, the law is as follows : A railway carriage should not be defective ; nor should the fans, lamps, windows or other conveniences be left in a defective state. Any injury suffered by a passenger due to the fault of the railway company or its agents or servants would give the injured party the right of action for damages. If goods were lost or damaged by the wrongful act or negligence of the Railway Company or its agents or servants, the

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\* My book ; Civil Wrongs and their Legal Remedies—2nd edn. pp. 108, 109, (D. B. Taraporevala Sons & Co., Ltd.)

owner of the goods could claim damages, unless the liability of the Railway Company was excluded by a risk-note. A **risk-note** was a document in the form approved by Railway Authority whereby in consideration of a lesser freight the Railway Company was given immunity from liability arising out of its or its agent's or servant's negligence. But a risk-note did not excuse a wilfully wrongful act. [Ardeshir Tamboli v. G. I. P. Rly., 1928, 52 Bom. 169 (P. C.).] Risk notes were abolished by the Indian Railways (Amendment) Act, 1949.

Under Indian Railways (Amendment) Act, 1943, a railway carrier was liable for any loss or damage to, or death of, a passenger, or for loss or damage of the articles carried with the passenger personally or on the train, even though there might not have been any wrongful act or negligence on the part of the railway concerned. Whether there was any negligence or wrongful act or not, the railway administration was liable, to not more than Rs. 10,000 for any loss of life of a passenger, or for any injury caused to him personally, or for damage to or loss of a passenger's articles or animals carried with the passenger in his compartment or on the train, provided the death, loss or injury was caused by an accident (when in the course of working a railway), being "either a collision between trains of which one is a train carrying passengers, or the derailment of or other accident to a train or any part of a train carrying passengers". And by the Indian Railways (Amendment) Act, 1949, provision has been made for appointment of **Compensation Commissioner** (Section 82B). The Commissioner would call for all particulars, take all the requisite evidence and then award compensation which would be binding on the Railway Company.

A claim for compensation must be made within three months from the date of the occurrence; but the Claims Commissioner may, on good cause shown to his satisfaction, allow a claim even after the three months have expired, provided the application is made, within one year from the date of the occurrence, but not thereafter.

A Claims Commissioner is empowered to give interim relief in fit cases. (Section 82E of the Indian Railways Act).

An appeal against the order of the Claims Commissioner (refusing compensation to the plaintiff or giving inadequate compensation) can be brought in the High Court of the place concerned by the applicant for compensation. But the High Court cannot grant any compensation in excess of the limit specified in section 82A.

When the specified kinds of articles (mentioned already) are contained in any parcel or package and delivered to a railway company for carriage, and the value of such articles exceeds Rs. 300, the railway company is not responsible for loss or damage, unless the person delivering or sending the parcel or package has caused its value and contents to be declared, at the time of its delivery for carriage, and, if required by the company, has paid or agreed to



pay a percentage on the value so declared by way of compensation for the increased risk. Such articles are described in the Second Schedule to the Railways Act.

### **Burden of Proof**

The burden of proof is on the bailee. The bailee is liable for loss or damage if he cannot satisfy the Court that all reasonable and required care was taken. (*Kush v. Kanta*, 1924, 28 Cal. W. N. 1041 ; *Trustees for Harbours of Madras v. Best & Co.*, 1899, 22 Mad. 524.) He can be held liable for negligence, in case of loss or damage to the plaintiff bailor's goods, even if his goods have got lost or damaged at the same time. (*Doorman v. Jenkins*, 2 A. & E. 256.)

### **Termination of bailment by bailee's act inconsistent with the terms of bailment [Secs. 153, 154]**

A lets to B, for hire, a horse for his own riding. B uses the horse in a carriage. A has got the option to terminate the bailment, because, under the Indian Contract Act, a contract of bailment is voidable at the option of the bailor if the bailee does any act which is inconsistent with the terms and conditions of the bailment. [Sec. 153] The bailee is also liable to compensate the bailor for any damage caused to the goods by an inconsistent use of such goods. [Sec. 154]

### **Mixture of bailee's goods with bailor's [Secs. 155-157]**

If with the consent of the bailor, the bailee mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares in the mixture so produced. [Sec. 155]

If, without the consent of the bailor, the bailee, mixes the goods of the bailor with his own goods, and if the goods can be separated or divided, the property in the goods remains in the parties respectively ; but the bailee is bound to bear the expense of separation or division, and for damages arising from the mixture. [Sec. 156]

If the bailee, without the consent of the bailor, mixes the bailor's goods with his own, and the mixed goods cannot be separated or divided, the bailor is entitled to compensation by the bailee. A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with the country flour of his own, worth only Rs. 25. The mixture cannot be separated. B must pay A for the loss of the flour. [Sec. 157]

### **Duty of bailee to return the goods bailed**

The bailee must return or deliver, according to the bailor's directions, the goods bailed, though no demand may have been made by the bailor in that respect, as soon as the time for which they were bailed has expired or the purpose for which bailment was made gets achieved. [Sec. 160]

### **Restoration of goods lent gratuitously**

A person who has made a *commodatum*, i.e., a free bailment, in favour of another person, can get back the goods from that other person, though the period of bailment may not have expired. But if, by reason of the loan of such goods, the borrower has so acted that the premature return of the goods bailed would cause him loss or damage exceeding the benefit actually derived by him from the loan, the borrower can claim compensation from the lender for the loss or damage so suffered by him. [Sec. 159]

### **Termination of gratuitous bailment**

A gratuitous bailment is terminated by the death either of the bailor or of the bailee. [Sec. 162]

### **Bailor entitled to any accretion on the goods bailed**

In the absence of any contract to the contrary, the bailee must deliver to the bailor, or according to his instructions, any accretion or profit which may have accrued from the goods bailed.

A bails with B a cow to be taken care of. The cow then, during the period of the bailment, gets a calf. B shall have to deliver to A both the cow and the calf, because, unless there be a contract to the contrary, the bailee is bound to redeliver the goods, with incretions to the bailor. [Sec. 163]

### **Bailor's responsibility to bailee**

The bailor is responsible to the bailee for any loss which the bailee may suffer if the bailor was not entitled to make the bailment as he did or if he was not entitled to receive back the goods or give directions with regard to them. [Sec. 164] The bailor is also responsible to the bailee for any loss or damage suffered by the bailee by reason of defect in the thing bailed if, in the case of a voluntary bailment (*Commodatum*), the bailor was aware of the defect, or in case of a hire, even if the bailor did not know of the defect, because it was his duty not to have given **on hire** a defective article. [Sec. 150] Also under Sec. 159 the bailor is liable to compensate the bailee for loss or damage suffered by him (the bailee) being in excess of the benefit received, in case the bailor, who had lent to the bailee the goods gratuitously, terminated the bailment before the expiry of the period of the bailment.

### **Bailee's responsibility to the bailor**

It is the duty of the bailee to deliver the goods back to the bailor after the termination of the period of bailment, and to take reasonable care of them as he would take of his own goods. [Sec. 160] The bailee must use the goods according to the terms of the bailment, and should not violate any of the conditions of the bailment. Where several joint owners of the goods have bailed the goods to a bailee, the bailee can deliver them back to, or according to the directions of, one joint owner without the consent of all the other joint owners ;

but if there is a contract to the contrary, then that contract will prevail. [Sec. 165]

If the bailor has no title or right to the goods, and the bailee, acting in good faith, hands them back, or according to the instructions of the bailor, the bailee is not liable to the owner in respect of such delivery to the bailor. [Sec. 166] (*Barker v. Furlong*, 1891, 2 Ch. 318.)

### **Right of a third party to claim goods which the bailor has bailed to the bailee [Sec. 167]**

If a person, other than the bailor, claims any title or interest to or in the goods bailed, he can apply to the Court praying that the Court may order the bailee not to deliver the goods to the bailor; and in such an application the title to the goods of a person entitled can also be determined. [Sec. 167]

When an adverse claim is made by an outsider (a third party) the bailee is bound to inform the bailor of the fact. (*Ranson v. Platt*, 1911, 2 K. B. 192.)

### **Rights and Liabilities of Finder of Goods [Secs. 168, 169]**

A finder of goods can keep the goods found till the true owner comes forward and by proof of his title demands them. If the finder of goods has incurred expenditure in preserving the goods in their original condition, he is entitled to be compensated or reimbursed by the true owner, provided the expenditure incurred by him over the goods has been reasonably and properly incurred. If the owner refuses to pay the finder his reasonable charges, the latter can claim a lien over such goods, *i.e.*, he can detain them for non-fulfilment of the owner's obligation to repay such expenditure. Though the finder of goods has a lien over the goods, he **cannot sue** the owner for the recovery, at law, of compensation for the moneys spent by him. [Sec. 168]

When the thing found by the finder is an article which is ordinarily the subject matter of sale, if the owner cannot, in spite of reasonable diligence by the finder to find him, be found, or if the owner refuses, upon demand, to pay the finder compensation for the lawful charges incurred by him with reference to the goods, the finder may sell away the thing found, in the following cases:—

- (1) when the thing is in danger of perishing or losing the greater part of its value; or
- (2) when the lawful charges of the finder, with regard to the thing found, have amounted to two-thirds of the value of the thing found. [Sec. 169]

### **Bailee's particular lien [Sec. 170]**

Ordinarily the lien possessed by a bailee is a **particular lien** unless by contract to the contrary the lien is made a **general lien**, or is altogether excluded.

**General and Particular Lien [Sec. 171]**

[A **lien** is a right possessed by a person to detain or retain the goods or property belonging to another person for non-fulfilment of an obligation by that other person. A lien may be (1) a general lien, or (2) a particular lien. A **general lien** is a lien which extends to transactions even **prior** to the one with regard to which the lien is sought to be exercised ; a general lien extends to the **general balance of account**. Bankers, factors, wharfingers, solicitors or pleaders of the High Court, and policy brokers, possess, in the absence of a contract to the contrary, a security for a general balance of account, *i.e.*, a general lien ; other persons have a particular lien, unless by express contract given a general lien. [Sec. 171] A **particular lien** is a lien which is **limited** in its operation to a **particular** transaction only, and **does not relate back or extend to previous transactions** or to a general balance of account. A repairer's lien or a tailor's lien, for example, is a particular lien. A goes to a tailor, gives him cloth and asks him to make a suit out of the cloth. The tailor makes the suit ready, and demands the remuneration for the making of the suit. Unless the same (as agreed upon, or a reasonable sum otherwise) is paid to the tailor, the tailor can exercise lien over the suit, *i.e.*, can detain the suit till the money is paid up. But if the agreement states that the tailor shall be paid after a time, the tailor cannot exercise the right of lien, because the obligation was not to pay at the time of delivery of the suit but at a subsequent occasion, *i.e.*, **after the period of credit got over**. A person's lien can, by express agreement, be taken away altogether ; and a person having a general lien can be made to relinquish it altogether or to have a particular lien only ; and likewise a person having under the law a particular lien can, by a contract, be given a general lien, or the lien may be taken away altogether.]

Under the law, an unpaid vendor of goods, a bailee, a pledgee (pawnee), an agent other than a factor, a finder of goods can, subject to contract to the contrary, claim a particular lien. On the other hand, a banker, a factor, a policy broker, a solicitor or a pleader of the High Court, ordinarily can claim a general lien, *i.e.*, in the absence of a contract to the contrary.

**Bailments by way of pledges or pawns [Secs. 172-178A]**

A **pledge** or a **pawn** is a bailment of goods as and by way of **security** for repayment of the debt or performance of the obligation under a contract. The bailor is called the "pawnor" or "pledgor", and the bailee is called the "pawnee" or "pledgee", and the transaction is a pawn or a pledge. [Sec. 172]

**Goods** can be pledged, but current money (through which goods can be bought or sold) cannot be pledged. For the validity of the pledge there must be a **delivery** of the goods to the promisee or the pledgee. Negotiable Instruments and shares in companies can

be pledged. (Carter v. Wake, 4 Ch. D. 605 ; Nanjar v. Pattar, 1942, 12 Comp. Cas. 180.) [Under the Indian law shares are regarded as goods though it is not so in England.] A transfer of possession is necessary to complete a pledge, and the possession of the pledgee must be *de jure* i.e., it must be lawful possession properly given. Mere *de facto* possession is not enough. Thus possession by one's wife or by one's servant does not constitute a *de jure* delivery. (Seagor v. Kessa, 24 Bom. 458.)

**A pledge differs from a mortgage.** In a pledge a special property in the goods passes to the pledgee but the general property remains in the pledgor. In the case of a mortgage the whole legal title may pass conditionally to the mortgagee. Secondly, in a pledge, the pledgee can sell away, without any application to the Court, the pledged property, if the pledgor fails to pay up the money within a reasonable time after the same has become due and a demand is made requiring payment. In a mortgage, on the other hand, the mortgagee, as a rule, takes a decree of a Court of law before having recourse against the property. Thirdly, whereas in some cases a mortgagee can foreclose the property, a pledgee cannot foreclose but can only have the property sold away.

### Rights of the pledgee

The pledgee can keep the goods pledged, not only for non-payment of the debt or non-performance of the promise, but for interest on the debt, and for all expenses properly and necessarily incurred for the preservation of the goods pledged. [Sec. 173]

The pawnee can also claim from the pawnor any extraordinary expenses incurred by the pawnee for the preservation of the goods pledged. But he has no right of lien over the goods pledged in respect of such extraordinary expenses. [Sec. 175]

In the absence of a contract to the contrary, the pledgee cannot retain the goods for a debt or a promise other than the debt or promise for which they are pledged, because the pledgee's lien is a particular lien and not a general one. When subsequent advances are made by the pawnee, a contract shall be presumed to the effect that the pawnee can retain the goods pledged for such other debts also. [Sec. 174]

If, at the time of repayment of the money, the pawnor fails to pay what is due payable or to perform the promise, the pawnee can bring a suit, if he so chooses, against the pawnor upon the debt or promise and can also keep goods as a collateral security, or, without bringing any suit, he (the pledgee) can sell the thing pledged, after giving the pledgor a reasonable notice that sale of the pledged goods would take place if the dues are not fulfilled by the pledgor. *The notice is obligatory in every case.* (Off. Assignee v. Madheolal, 48 Bom. L. R. 828.) If the pawnee sells away the pledged goods,

and the proceeds of such sale are less than the amount due to him in respect of the debt or promise, the pawnee is entitled to sue the pawnor for the balance. If the proceeds of such sale are greater than the amount due to the pawnee, the pawnee must pay over the surplus to the pawnor. [Sec. 176]

If the pawnee sells through the Court, he can buy at the Court sale. [Neckram v. Bank of Bengal, 1892, 19 Cal. 322 (P.C.)]; otherwise he cannot buy the goods. (Henderson v. Astwood, 1894 A. C. 158.)

In spite of the fact that the time stipulated for the payment of the debt may have expired, or the date of performance of the promise may have passed, the pawnor can, even at the eleventh hour, *i.e.*, before the goods pledged are actually sold away, redeem the goods pledged by paying away all the lawful dues of the pawnee. In such a case, the pawnor is liable to pay also for the expenses of the sale or any other additional expense which may have arisen by reason of his default in paying up within the proper time. [Sec. 177]

### Pledge by mercantile agent [Sec. 178]

A mercantile agent is a person who has, under the ordinary custom of his business, got the right to sell, buy or pledge goods, on behalf of his principal. When goods are bought, or when a pledge is taken from a mercantile agent by a bona fide purchaser, or pledgee, as the case may be, the latter gets a good title to the sale, or the pledge, as the case may be, provided the mercantile agent was with the consent of the owner in possession of the goods concerned or the documents of title to the goods concerned, and provided the mercantile agent acted in the ordinary course of business as a mercantile agent, even though the owner of the goods had expressly forbidden the mercantile agent to sell or to pledge, as the case may be, the goods concerned. This is so, in the interests of innocent purchasers and pledgees taking from a **reputed** person like a mercantile agent with whom the owner has voluntarily kept his goods.

A pledge made by a person with whom possession of the goods has been voluntarily left by the owner, can also be enforced, the circumstances being such that the owner (having left them voluntarily) is now **estopped** from pleading that the pledgor had no authority to pledge the goods. (Sunder v. Das, 1908, 30 All. 165.) A entrusts B with an article of jewellery for sale on commission. B wrongfully pledges it with X who did not know that B had authority to sell but not to pledge. X can claim the amount he had advanced to B, before he can be compelled to hand over the article to A, because A had, by having left it with B, trusted in B. If B betrayed that trust, it is A's chance. The innocent third party should not be made to suffer. He gets a good title to the pledge. (Sesappa v.

Subramania, 1917, 40 Mad. 678.) A gratuitous bailee (one who had taken *commodatum*) cannot make a binding pledge; so the pledgee cannot get a good title to the extent of the amount advanced by him or to any extent whatever. (Ramaswami v. Kamalammal, 1922, 45 Mad. 173.)

A wife in possession of her husband's property (even articles of jewellery), as a bare custodian on his behalf, cannot make a binding pledge of the goods. (Seager v. Kessa, 1900, 24 Bom. 458.) The same applies to the case of a hirer. (1904, 27 Mad. 424.) A servant entrusted by his master with custody of goods cannot make an enforceable pledge so as to bind the master. (4 Cal. 497).

### **Pledge by person in possession of goods on voidable contract [Sec. 178A]**

When a person has obtained goods by fraud, misrepresentation, coercion, or undue influence, and thus obtained the consent of the other person in an unfree manner, the other person can claim back his goods, and avoid the agreement because the agreement is voidable under the Contract Act. If, however, before the contract is avoided and the goods obtained back by the aggrieved party, the wrong-doer transfers them away to an innocent purchaser or gives them in a pledge as security, the purchaser or the pledgee, as the case may be, acting in good faith, gets a good title, or a good pledge to the goods, as the case may be. A obtains goods by coercion from B, and before B can claim back the goods, transfers them to X a bona fide purchaser for value; X would get a good title to the goods. And if X in this illustration had been a pledgee, instead of being a purchaser, his pledge could be regarded as valid. (Devidan v. Ammal A. I. R. 1932 Mad. 428.)

### **Pledge where pledgor has only a limited interest [Sec. 179]**

When the pledgor pledges goods in which he has only a limited interest, the pledge would be valid only to the extent of that limited interest, and nothing more than that. [Sec. 179]

### **Suits by bailees or bailors against wrong-doers [Secs. 180, 181]**

When a third party wrongfully deprives the bailee of the use or possession of the goods bailed or does the goods any harm, the bailee is entitled to sue the third party for damages; the bailor also is entitled to bring such a suit. [Sec. 180] (Ramnath v. Pitambar, 43 Cal. 733.) When relief is obtained by suit brought against the third party by the bailor, the same will be distributed or dealt with according to the respective interests of the bailor and the bailee. [Sec. 181]

### **Pledge of documents of title**

A pledge of a document of title to goods is deemed to be a pledge of the goods represented under the document. (Official Assignee, Madras v. Mercantile Bank, 1934, 61, I. A. 416.)

## CHAPTER XVII

### AGENCY

#### **“Agency”, meaning of “Agent” and “Principal”—Agency and Analogous Transactions [Sec. 182]**

An **agency** is an engagement for establishing privity of contract (legal relation) between one person who employs an agent and another person with whom the agent contracts on behalf of the former. A person may do a thing himself or through the agency of another. In law, the acts of an agent bind the principal, if the acts are within the scope of the agent's authority. The maxim is : *“qui facit per alium facit per se”* (he who does through another does by himself). *Qui per alium facit per seipsum facere videtur, i.e.,* who per another does, is deemed to do it himself. The person who engages or authorises another to represent him or to do any act for him is known as the **“principal”**; the person employed to do the act or authorised to represent another is called the **“agent”**; and the transaction itself is known as **“agency”**. Where one person can bind another or establish privity of contract between his employer and an outsider, there may be an agency transaction.

**Agency differs from an employment** in the sense that an agency presupposes authority expressly or impliedly vested in the agent to bind his principal, by entering into contracts on behalf of the principal; but on the other hand a servant is under the control of his master, and ordinarily he has no power to contract on behalf of his master so as to bind him. But a servant can be employed specially to act as agent.

An agent must also be distinguished from an independent contractor. An agent makes his principal liable by intra vires acts done by him on behalf of the principal. He can be regarded as the connecting link between the principal and the outsider with whom he contracts on behalf of his principal. But an independent contractor is one who, subject to the general plan and directions and requirements of his employer, is otherwise free to contract of his own and is himself liable thereon. He does not represent anybody; nor does he contract on behalf of his employer.

For the acts of the agent, his principal is liable, unless the agent did an ultra vires act, i.e., did something in excess of his authority or powers; this is based on the maxim : *qui sentit commodum sentire debet et onus, i.e.,* who experiences advantage ought to sustain the burden. The employer of an independent contractor cannot be held liable for the acts of the contractor, unless (i) the act of the contractor was illegal, or (ii) the independence of the contractor was



broken by the unwarranted interference by the employer, or (iii) liability was imposed by some statute, or (iv) the act was necessarily dangerous. (See *Ellis v. Sheffield Gas Consumers Co.* 22 L. J. Q. B. 42; *Burgess v. Gray*, 1 C. B. 578; *Hole v. Setingbourne Co.*, 6 H. & N. 488; *Bower v. Peate*, 1 Q. B. D. 321.)

### The true test of agency

The **true test of agency** is the **capacity or otherwise** of the person (alleged or supposed to be the agent) **to bind** the principal by **intra vires** acts and thus to establish a privity of contract between some third party (outsider) and his principal. If he can make his principal liable to third parties, he is really an **agent**; otherwise he is not an agent. (*Basu v. Kishore*, 12 C. W. N. 28.)

A guardian of a minor is not an agent of the minor; nor is the committee appointed by the Court an agent of the lunatic concerned. (*Ramal v. Vadilal*, 20 Bom. 61.) So also a benamidar is not an agent. (*Behari's case*, 5 B. L. R. 237.)

### Can a contract of agency be specifically enforced ?

The Court will not enforce a contract of agency so as to order its specific performance, for such a relief is disallowed under the Specific Relief Act.

### Modes of creating agency [Secs. 186, 187, 196-200]

The relation of agency can be created by **agreement**, written, oral or implied. A **power-of-attorney** requires to be in writing under seal. Agency can also be implied in law, looking to the relation between the parties concerned, *e.g.*, in a partnership, each partner is deemed to be an agent of every other partner. Agency may also be created by **estoppel** or **holding out**. A person, who represents to another that he is an agent, may be estopped from later denying that he acted as agent in the transaction concerned. Again where a person knows that another person or firm is acting or pretending to act as an agent of his, he must take steps to terminate such representation. A knows that B is acting for him. If A does not prevent B from continuing to act for him he would be liable for B's acts; in other words A would be estopped from denying that B was his agent. Agency may also arise out of **necessity**, *e.g.*, in the case of a deserted wife pledging her husband's credit for necessities of life (the husband being liable for the wife's act of having the necessities for her maintenance) or in the case of a master of a ship pledging his principal's (the owner's) credit in cases of emergency when communication with the principal is not possible. **Ratification** is the approbation of an act which was previously unauthorised. A buys goods for X who had not authorised him to do

so. X is not bound by A's act unless there is a subsequent approval of the same. If X approves what A did for him, X would be liable for A's act. In order that there can be a **valid ratification**, the act ratified must have been done for somebody **in existence at the time it was done**, and the act itself must be a lawful one and must have been done with full knowledge on behalf and in the name of the supposed principal. The act must not be such as throws an innocent person on the horns of a dilemma. A promoter of a company enters into a contract which purports to be on behalf of a company which is yet to be registered. The company, after being registered, purports to ratify the promoter's contract. Is this a valid ratification? No, it is not a valid ratification in so far as the company was not incorporated at the time the promoter's contract was entered into; the company, not being in existence at that time, could not later ratify the contract. (Empress Engineering Co., 16 Ch. D. 125.) The promoter himself would remain liable on the contract, unless he had stipulated that unless after incorporation the company entered into a new contract embodying the terms of his (promoter's) contract, the promoter himself would not be liable. (In re Northumberland Hotel Co., 33 Ch. D. 16.) An act which has the effect of subjecting unjustly a third person to damages or to catch him on the horns of a dilemma cannot be ratified. (Thinappa v. Krishna, A. I. R. 1941, Mad. 6.) A is in possession of X's goods. Y asks A to hand over X's goods to him (Y). As a matter of fact, X has not authorised Y to get goods from A. Can X ratify the act, and then claim damages from A for wrongful detention of the goods? No, such ratification would be void, for if it were allowed, X would be entitled to claim damages from A without there having been any fault on his (A's) part. (Thinappa v. Krishna, 1941 Mad. 6.) Ratification may be expressed or implied. A, in an unauthorised manner, buys goods for X. X sells away those goods to Y on his own account. X has by his conduct ratified A's act of buying goods for him. Otherwise he ought to have disowned the transaction, *i.e.*, he ought not to have sold away the goods.

### Different kinds of agents

Agents are of different types. Brokers, auctioneers, commission agents, *del credere* agents, factors, katcha adatis, solicitors and pleaders, are some of the different kinds of agents.

A mercantile agent employed to buy and/or sell property or to establish privity of contract between the employer and a third party is termed a **broker**. Unlike a factor, a broker has no possession of goods or property. (Patiram v. Kankinram, 42 Cal. 1050.) His duty is to establish privity of contract between his principal and an outsider (a third party).

A **factor** is a mercantile agent who has got discretionary powers to sell the goods which are kept with him for the purpose. (Stevens v. Miller, 25 Ch. 31.) A factor's lien is a **general** lien, *i.e.*, a lien which is not merely confined to one particular transaction between the parties concerned, but with regard to previous transactions also, being a lien for a general balance of accounts.

An **auctioneer** differs from a factor in that the auctioneer has a **particular** lien, while the factor has a general lien. An auctioneer also has possession of goods. An auctioneer can in his own name sue the buyer who does not pay the price. (Wolfe v. Horne, 2 Q. B. D. 355.)

A **del credere agent** is one who, in consideration of an **extra remuneration**, agrees to be **liable to his principal** for any loss or damage caused to him by the non-performance of the contract which he has brought about between his principal and a third party. (Morris v. Cleansby, 4 M. & S. 566.) In Fazal v. Mangalas (46 Bom. 489), it was held that certified brokers of the Bombay Native Stock and Share Brokers' Association are *del credere* agents responsible to their constituents for non-performance of the contract by the third party.

A **katcha adatia** is an **agent** who holds himself ready and willing to contract for his principal, but not so as to make himself responsible to the principal in case of non-performance of the contract. He is responsible, however, to the other adatia or shroff (agent) who acts on behalf of the other contracting party. A, a merchant in Ahmedabad, wishes to buy goods in Bombay. He employs a katcha adatia (agent) to find out a seller who would sell the required goods. X may approach another agent who would on behalf of the seller contract with him. As between the adatias themselves, X is responsible to the other adatia for the performance of the contract, but being a katcha adatia he is not responsible to A, if the contract is not performed.

An **indentor** or **indenting** agent is an agent who, for a commission allowed to him, procures a sale or a purchase (on behalf of his principal) with a merchant abroad. Such agent can charge commission at the rates mentioned in the indent. (Bier v. Chotalal, 30 Bom. 1.)

A **commission agent** is an agent who procures a buyer or a seller for a customer. If he succeeds he gets his commission. His lien is a particular lien.

### General and particular agents

A **general agent** is one who, in a recognised business, *e.g.*, that of brokerage or in a factor's or commissioned agent's business, generally represents his principal. He is entitled to do generally all that is requisite for an efficient handling of the business concerned.

A **particular agent** is one who represents his principal on a particular occasion, *e.g.* a proxy for a shareholder to vote at a meeting of a company, or a person authorised to do a particular act only.

### Who can employ an agent?

Any person who is competent to contract and of sound mind can appoint an agent. A lunatic or a minor cannot appoint an agent, though a minor himself can be appointed agent (but not an insurance agent) so as to make the other party and his principal liable without he (the minor) himself being liable. [Sec. 183]

## FORM OF POWER OF ATTORNEY

### (a general power)

WHEREAS (state name of the appointer), a.....  
 Inhabitant residing at.....(state address).....  
 and doing business at.....herein after called "the appointer", is desirous of appointing one.....(state name of the appointee), of.....  
 (state his address), hereinafter called "the attorney" as his attorney,  
 AND WHEREAS the said attorney is willing to act as such,

NOW THESE PRESENTS WITNESS :—

That the said.....(state name of appointer) hereby appoints the said.....(state name of appointee) as his attorney to represent him and to manage, on his behalf, generally his business and to receive and keep goods and sell the same and keep accounts of all dealings and to enter into necessary contracts.

That the said attorney shall have also the power to—

- (a) institute, abandon, commence, proceed with, settle or compromise suits and proceedings regarding the said business, property and effects of the said..... (appointer) on his behalf ;
- (b) compromise, compound, adjust or refer to arbitration any claim, suit or proceeding regarding the said business and its property ;
- (c) draw, accept, indorse, negotiate, pay, for the said business and on behalf of the said appointer, bills of exchange, promissory notes, cheques, hoondis, drafts and such other securities as may be permissible under the law ;
- (f) to operate any account with a scheduled bank in the name of the said appointer ;
- (g) to maintain, for and on behalf of the said appointer, office premises, and to appoint officers, clerks, servants, agents and sub-agents as may be necessary and desirable for the efficient management of the said business and in the best interests of the appointer ;

and (h) to do all such other things as may be necessary or desirable for the efficient handling of the agency business.

Given under the hand and seal of the appointer this.....  
day of.....19 .

In the presence of :—

.....

Signature :

(of appointer)

(Justice of the Peace/Honorary Magistrate)

of.....

.....

## FORM OF A SPECIFIC POWER-OF-ATTORNEY

WHEREAS I,....., of....., a....  
 .....Inhabitant, residing at, and doing business as, here-  
 inafter called the appointer, am desirous of appointing.....,  
 of.....as my attorney

NOW THESE PRESENTS WITNESS :—

That I, the appointer, do hereby appoint as my attorney, the  
 said.....(appointee's name), as my attorney for the  
 specific purpose of instituting, for and on my behalf, a law suit  
 regarding my land and building, called the.....Estates,  
 situate at.....in the Province of.....and to  
 appoint lawyers and to incur such expenditure as may be necessary  
 or desirable in the efficient handling of the said suit, and even to  
 settle or compromise such suit as may be thought fit, as far as  
 possible after consulting me in that behalf, but not so as to refer the  
 same to arbitration without my sanction previously obtained.

Given under my hand and seal this.....day of  
 .....19 .

In the presence of

Signature

.....

(of appointer)

J.P./Honorary Magistrate, of

.....

### Who may be appointed agent ?

Any person can be appointed agent to do an act on behalf of  
 another or to represent him. Even a minor can be employed as an  
 agent, but such minor will not be liable himself though he would  
 make liable, by the contract transacted by him, his principal and  
 the other party. [Sec. 184]

### Consideration not necessary for agency

Just as in a bailment consideration is not necessary, so also  
 in an agency consideration is not necessary. [Sec. 185]

### Position of counsel, solicitor, and pleader

A counsel, being the *dominus litis* (master of the litigation) can compromise a case of his client even without authority of his client, but he cannot refer to arbitration upon conditions which are different from those which his client has authorised. (*Neale v. Gordon*, 1902 A. C. 465). Matters which have no relevancy to the suit cannot be compromised by the counsel without the consent of the client. (*Nando v. Nistarini*, 27 Cal. 428.) When the authority of the counsel to compromise has, while the brief was delivered to him, been taken away, and the counsel accepted the brief without objection, the right of the counsel to compromise, without the consent of the client, no longer exists. (See also *Muthiah v. Muthuchetti*, 50 Mad. 786, 797, 798.)

A solicitor can, in the absence of a contract prohibiting him from doing so, compromise a matter so as to bind his client; but in such a case if the client can show that the compromise was brought about by a misunderstanding between the solicitor and the client, he can apply for setting aside of that compromise on the ground of mistake.

With regard to a pleader, the law is that he can bind his client, except by an admission erroneous in law. (*Krishnaji v. Rajmal*, 24 Bom. 360; *Venkata v. Bhashyakarlu*, 22 Mad. 538.) He cannot settle any matter or suit on behalf of his client without the express consent of his client.

### How far is the relation between husband and wife capable of constituting a relation of agency?

Ordinarily, a wife is not the agent of the husband; nor is a husband the agent of his wife. By agreement or appointment, or by holding out, representation, or ratification, a husband can appoint his wife as his agent, or a wife can appoint her husband as her agent. A husband is liable for his wife's contract if he had expressly or impliedly sanctioned it. (*Girdharilal v. Crawford*, 9 All. 147.)

The wife is deemed in law to be an agent of her husband even without an appointment in that behalf, in respect of **necessaries of life** purchased by the wife from a trader. (*Callot v. Nash*, 39 T. L. R. 292.) Traders, who have been dealing with her, and who have been paid by her husband, can assume that the wife's authority to pledge her husband's credit continues. When, without any lawful cause or just excuse, the husband has deserted his wife, the latter becomes an agent of necessity, i.e., she can pledge her husband's credit for necessaries of life. (*Viraswamy*, 1 Mad. H. C. R. 375) See also *Debenham v. Mellon*, 1880, 6 A. C. 24, 31.)

The presumption of agency and the authority of the wife to and her husband can be set aside by showing that—

- (1) The husband had given notice to the traders dealing with his wife that they should no longer deal with her or allow her credit; (*Holt v. Brien*, 4 B. & Ald. 252); or
- (2) By showing that the wife has been given and is being given by the husband a sufficient sum of money for buying the necessities without pledging her husband's credit (*Sultan v. Horace*, 30 Mad. 543), or by showing that the husband has in fact forbidden his wife to pledge his credit. (*Jolly v. Rees*, 1863, 15 C. B. 628.)

The husband cannot be held liable for his wife's debt contracted by her in a separate business of her own in which he was not concerned. (*Allumudy v. Brahan*, 4 Cal. 190.)

#### **Extent of agent's authority [Secs. 188, 189]**

The authority of an agent extends to the doing of all that is necessary and collateral to the doing of the main act. A is employed by B to recover the debt due to B. A can engage lawyers for the purpose of filing a suit and recovery of the debt, and can give a valid discharge for the same. Where borrowing becomes absolutely necessary (looking to the nature of the business), the agent can borrow; but otherwise than in such types of business he has no implied authority to borrow money. (*Baron Park's judgment in Hawtayan v. Bourne*, 7 M. & W. 595. See also 3 Q. B. D. 364; 5 Ex. 86; and 53 All. 1009.)

In an emergency, an agent can do all such acts for protecting his principal from loss or damage as would be done by a person of ordinary prudence under similar circumstances. Thus an agent can have the goods (kept with him for sale) repaired, if the agent thinks that it is necessary to so repair them, in order that proper price may be fetched on sale. [Sec. 189]

#### **“Sub-agent” distinguished from “Co-agent” or “Substituted agent” [Sec. 194]**

A sub-agent is an agent appointed by the agent himself to act under him. A sub-agent is different from a co-agent. Whereas a sub-agent is appointed by the agent, without having been asked to do so by the principal, a co-agent is an agent who acts along with the agent and is appointed either by the principal or by the agent under the instructions from or directions of the principal. A co-agent is also sometimes known as a substituted agent.



### When can an agent lawfully appoint a sub-agent ?

As a rule, an agent cannot appoint a sub-agent. (*Delegatus non potest delegare* or, *Delegata, potestas non potest delegari.*) It is not permissible for an agent to appoint a sub-agent, unless—

- (1) the nature of the business necessitates such appointment ; or
- (2) custom or usage of trade in the locality, with regard to the business, allows the appointment of a sub-agent ; (Moon v. Witneg Union, 3 Bing. N. C. 814); or
- (3) the contract of agency itself allows the appointment, in the discretion of the agent. [Sec. 190]

### Consequences of Appointment of Sub-agents

A sub-agent is employed by the agent and acts under the control of the agent. [Sec. 191] If he has been properly appointed, the principal is, with regard to all third parties, represented by the sub-agent and is liable for the sub-agent's acts as if he himself had originally appointed him. The agent is responsible to the principal for the acts of the sub-agent. The sub-agent is liable for his acts to the agent, but not to the principal, unless he, the sub-agent, has been guilty of fraud or wilful wrong-doing. If the sub-agent, though properly employed, fraudulently acts, e.g. disposes of wrongfully the principal's property or goods in the agency business, the agent is liable to the principal for the sub-agent's wrongful act. [Sec. 192] (*Nensukdas v. Birdichand*, 19 Bom. L. R. 948.)

Where a sub-agent has been improperly appointed by an agent (who had no power to make such appointment), the agent is responsible, like the principal, for the acts of such sub-agent, and is liable for such sub-agent's acts both to his own principal and to the third parties. [Sec. 193]

### Agent's duty in naming and appointing co-agent [Sec. 195]

An agent, empowered by the principal to appoint a co-agent, must, while selecting such co-agent, act with such amount of discretion and care as a man of ordinary prudence would do in his own case. If the agent does exercise such care and discretion he is not liable to the principal for acts of negligence committed by the co-agent so selected. A instructs B, a merchant, to buy a ship for him. The merchant engages a ship surveyor of **good reputation** to choose a ship for A, but the surveyor is guilty of negligence in selecting a ship which turns out unseaworthy, and is lost. **Not the agent**, but the surveyor is liable to A the principal.

### Revocation of agency [Secs. 201-210]

An agency may be terminated or revoked by act of the parties, i.e., the principal can put an end to the agent's authority by a notice to the agent, or the agent can renounce the agency by notice to the

circumstances of the case show that any material fact has been dishonestly concealed from the principal by the agent or that the dealings of the agent have been disadvantageous to the principal. (*Naidu v. Oakley*, 1922, 45 Mad. 1005.) [Sec. 215]

(6) If an agent, without his principal's knowledge, deals in the business of the agency, of his own account, the principal can claim from the agent any benefit which may have resulted in favour of the agent from the transaction. (*H. Wilson & Co. v. Bata* 1927, 54 Cal. 549; *Mayen v. Alston*, 16 Mad. 238; *Kaluram v. Chimniram*, 1934, 36 Bom. L. R. 68.) [Sec. 216.]

(7) An agent is entitled to retain out of sums of money received by him on account of the principal in the course of the business of the agency all such sums as are due to him by way of expenses or advances properly incurred by him in conducting the business of the agency; he can also retain such remuneration as has been earned by him for having acted as agent. But if he dealt on his own account in the business of the agency he cannot claim his remuneration. (*Harivalabh v. Jivanji*, 1902, 26 Bom. 689; See also 1937, 1 Cal. not A. [Secs. 217; 218.]

neration.  
sesses that In the absence of a special contract to that effect, an A, who is entitled to his remuneration after he has completed the property regard to which the remuneration is payable. Thus a debt. A is has established privity of contract between his principal the debtor's party is entitled to his brokerage after such privity has type, i.e., he fed, even though the transaction may not be carrier of the agency. 'his is subject to a contract to the contrary. ed with interest. (See Rs that the broker shall not get any R. 1075; *Lakmichand v. Cation* is set through, he will not be connection see *Burchell v. Gowrie*

In the absence 14; See also *Raghu v. Mad* contrary, an agency coupled with interest 03, 30 Cal. 202; *Municipal* the agent has himself an interest in the pr4.) [Sec. 219.] The subject matter of the agency, cannot be terminated the prejudice of such interest. So if the interest concerned is made good—if the agent, i.e., the creditor, is paid up—even such an agency can be terminated. [Sec. 202]

### **Termination of authority of agent terminates the authority of the Sub-agent**

When the authority of the agent is terminated, the authority of all sub-agents appointed by the agent is also terminated. [Sec. 210]

### **Agent's Duties to the Principal [Secs. 211-221]**

(1) An agent must, except in an emergency (*Damodar v. Shivram*, 29 All. 730), conduct the business of his principal according to the principal's directions. If the principal has not given any

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- (3) the contract of agency itself allows the appointment, in the discretion of the agent. [Sec. 190]

### Consequences of Appointment of Sub-agents

A sub-agent is employed by the agent and acts under the control of the agent. [Sec. 191] If he has been properly appointed, the principal is, with regard to all third parties, represented by the sub-agent and is liable for the sub-agent's acts as if he himself had originally appointed him. The agent is responsible to the principal for the acts of the sub-agent. The sub-agent is liable for his acts to the agent but not to the principal, unless he, the sub-agent, has been guilty of fraud or wilful wrong-doing. If the sub-agent, though properly employed, fraudulently acts, e.g. disposes of wrongfully the principal's property or goods in the agency business, the agent is liable to the principal for the sub-agent's wrongful act. [Sec. 192] (Nerimbaram v. Richard, 19 Bom. L. R. 948.)

43 Cal. If a sub-agent has been improperly appointed and rendered powerless to make such appointment), the agent fails 48 Bom. L. R. principal, for the acts of such sub-agent. 654 ; see also 49 Cal. 100. The agent is liable for his acts both to his own principal and to the principal.

(4) An agent must use all reasonable diligence in communicating and appointing co-agent and in trying to obtain the instructions of the principal to act. [Sec. 214.] If, however, there is an imminent catastrophe facing the venture and if there is no time left for the agent to communicate with the principal, the agent can, because of the necessity of the case, do all that a reasonable man would under similar circumstance do with regard to his own goods. He becomes an agent of necessity, and can act even without any instructions of the principal, for there is no time to lose.

(5) An agent should not deal on his own account in the business of the agency, without first obtaining the consent of his principal and making him aware with regard to all material circumstances of which the agent is aware ; if the agent wrongfully deals on his own account, the principal can avoid the transaction, if the agent is not a partner in the business.

circumstances of the case show that any material fact has been dishonestly concealed from the principal by the agent or that the dealings of the agent have been disadvantageous to the principal. (*Naidu v. Oakley*, 1922, 45 Mad. 1005.) [Sec. 215]

(6) If an agent, without his principal's knowledge, deals in the business of the agency, of his own account, the principal can claim from the agent any benefit which may have resulted in favour of the agent from the transaction. (*H. Wilson & Co. v. Bata* 1927, 54 Cal. 549; *Mayen v. Alston*, 16 Mad. 238; *Kaluram v. Chimni-ram*, 1934, 36 Bom. L. R. 68.) [Sec. 216.]

(7) An agent is entitled to retain out of sums of money received by him on account of the principal in the course of the business of the agency all such sums as are due to him by way of expenses or advances properly incurred by him in conducting the business of the agency; he can also retain such remuneration as has been earned by him for having acted as agent. But if he dealt on his own account in the business of the agency he cannot claim his remuneration. (*Harivalabh v. Jivanji*, 1902, 26 Bom. 689; See also 1937, 1 Cal. 757.) [Secs. 217; 218.]

(8) In the absence of a special contract to that effect, an agent is entitled to his remuneration **after he has completed the act** with regard to which the remuneration is payable. Thus a broker who has established privity of contract between his principal and a third party is entitled to his brokerage after such privity has been established, even though the transaction may not be carried through; **but this is subject to a contract to the contrary, i.e.,** if the contract says that the broker shall not get any brokerage unless the transaction is set through, he will not be entitled to any brokerage. In this connection see *Burchell v. Gowrie and B. Collieries, Ltd.*, 1910, A. C. 614; See also *Raghu v. Madan*, 38 C. L. J. 139; *Elias v. Govind*, 1903, 30 Cal. 202; *Municipal Corpn., Bombay v. Cooverji*, 20 Bom. 124.) [Sec. 219.]

(9) An agent who has misconducted himself in the business of the agency cannot claim any remuneration for the business so misconducted. (*Sirdhar v. Gopal*, 1940 (A. I. R.) Mad. 299.) [Sec. 220]

(10) Unless there is a contract to the contrary, an agent can exercise lien, i.e., retain the goods, papers and other documents and property belonging to the principal and in possession for the time being of the agent until the amount due payable to the agent as commission, disbursement or for services in respect of the agency has been paid or accounted for to the agent. Even a sub-agent who has been properly appointed has a lien over the principal's property. (*Montague v. Freewood*, 1893, 2 Q. B. 350.) A sub-agent cannot

have any lien, if not validly appointed. (*Fisher v. Smith*, 4 A. C. 1.) The agent's right of lien is subject to equities of outsiders against the principal, except in cases of money and securities that are negotiable. (*In re Llewelin*, 1891, 3 Ch. 145; *London & County Bank*, 6 A. C. 722.) [Sec. 221].

### **Principal's Duties to Agents [Secs. 222-225]**

(1) It is the duty of the principal to indemnify his agent against the consequences of all lawful acts which the agent may have done in the exercise of the powers given to him by the principal. (*Bakale v. Hombanna*, 1932 Bom. (A. I. R.) 593, even though the act be a wager—if lawful. *Shibho v. Lachman*, 23 All. 165.) [Sec. 222.]

(2) For an act of a criminal or wrongful type, which the agent is employed by the principal to do, the principal is not liable to the agent to indemnify the agent against the consequence which may follow the commission of such criminal or wrongful act. [Sec. 224.]

(3) It is the duty of the principal to compensate the agent for injury caused to such agent by reason of negligence of his principal or by reason of his want of skill. A employs B in building a house. A puts the scaffolding himself. B falls down and is injured because the scaffolding was done without skill. A must compensate B. [Sec. 225.]

(4) Where an agent does an act in good faith the principal is liable to indemnify the agent even though the act done by the agent may cause an injury to the rights of a third person. A, a decree holder, gets an officer of the Court to seize B's goods. B is the person against whom A has obtained the decree. The officer believes that he is seizing B's goods, but it turns out that the particular goods were not B's but C's. C, the true owner, sues the officer for wrongfully taking hold of the goods and the officer is compelled to pay to C damages. Now A, the principal, is liable to indemnify the officer (the agent) for the sum of money which the latter had been made to pay to C. [Sec. 223.]

### **Consequences of agency and the rights of third persons [Secs. 226-238]**

For acts done by an agent and for obligation arising from such acts, the third party can sue the principal as if the contract and all the acts done had been done by the principal in person, provided the acts done by the agent were done in the name of the principal and were not in excess of the agent's powers. [Sec. 226.] If an agent has done more than he is authorised to do, and that part of which he has done can be separated from the part which is in excess of his authority, so much only as is within his authority is binding as between him and the principal. A, the owner of a ship, authorises B to procure a policy for Rs. 4,000 on the ship. B procures a policy for Rs. 4,000 on the ship, and for Rs. 2,000 on the cargo. B's act in procuring

insurance on the cargo is without authority. He was never asked to procure insurance on the cargo ; and so he will remain personally liable on that transaction, but for the insurance on the ship, the principal remains liable. [Sec. 227]

An act of the agent in excess of his power—or authority—can be approbated (ratified) by the principal if he desires so to do ; in such a case the principal becomes liable. *Omnis ratihabitio retro-trahitur et mandato priori acquiparatur*, i.e., a subsequent ratification works retrospectively and is equivalent to a prior mandate.

When what the agent has done is in excess of his authority and cannot be separated from what is within his authority, the principal is not liable at all and can disregard the whole transaction. A authorises B to buy 500 lambs for him. B buys 500 lambs and 400 sheep for a sum of Rs. 4,000. A may disregard the whole transaction and is not liable at all, **because there is only one amount of Rs. 4,000** payable for the 500 lambs and 400 sheep. Had there been different sums payable, then it would have been otherwise. [Sec. 228]

Any notice given to an agent, or any information conveyed or obtained by an agent, in the ordinary course of business done by him for the principal, can and does, so far as the principal and the outsiders are concerned, have the same legal effect as if it had been given to or obtained by the principal. [Sec. 229]

### **When is an agent entitled to personally sue and is personally liable on contracts entered into by him ?**

**As a rule**, an agent cannot personally enforce contracts entered into by him on behalf of his principal ; nor is he personally liable on such contracts; this is in the absence of a usage or any contract to the contrary. [Sec. 230] (*Humble v. Hunter*, 17 L. J. Q. B. 350.) A contract to the contrary is presumed in any of the following cases:—

- (1) Where the agent has exceeded his authority, or has not disclosed the name of his principal. (*Bhojabhai v. Samuel*, 22 Bom. 754.)
- (2) Where the contract is made by an agent on behalf of a merchant resident abroad, and it is for sale or purchase of goods ;
- (3) Where the principal though disclosed cannot be sued.

An agent with a special interest or with a beneficial interest, e.g., a factor or auctioneer can sue and be sued personally. (*Subramanya v. Narayanna*, 24 Mad. 130.) [Sec. 230]

### **Rights of parties to a contract where the principal is not disclosed**

When an agent makes a contract with a third party who neither knows nor has reason to believe or suspect that he is an agent, his

principal may call upon him (the outsider) to perform the contract ; but this is subject to the law that whatever right the outsider would and could have had against the agent if the agent had been the principal and had sued him, he (the outsider) will have against the principal also. [Sec. 232] A, as agent of B, contracts with C, without disclosing to C that A is B's agent. B can sue C on the contract, and C cannot say that he never knew B. But now supposing that C had a claim of Rs. 500 against A the agent, he (C) can plead a set-off of this sum of Rs. 500 as against B also if and when sued by B. If, however, **the principal discloses himself** before the contract gets completed, the other contracting party may, if he chooses to do so, refuse to fulfil the contract, if he can show that if he had known the principal before or that if he had known that the agent was not the principal, he would not have entered into the transaction. But if **some other person discloses** the principal, the outsider remains bound to complete and fulfil the contract. He cannot then refuse to complete it. (*Lakshmandas v. Anna*, 1908, 32 Bom. 356.) [Sec. 231.]

### **Liability of a person untruly representing himself to be an authorised agent of another**

A person who untruly represents himself to be an authorised agent of another person, and thereby induces a third party to deal with him as such agent, is liable on such contract personally, if his alleged or supposed principal does not ratify the contract. The agent would be liable for what is known as **breach of implied warranty of authority**. (*Prasad v. Sarju*, 34 All. 168 ; *Dunn v. Macdonald*, 1897, 1 Q. B. 555.) [Sec. 235.]

A person, who falsely represents himself to be an authorised agent of another person and induces a person to deal with him as such agent, cannot call upon the other party to perform the contract. (*Das v. Jankidas*, 39 Cal. 802 ; *Nanda Lal v. Gurupada*, 1924, 51 Cal. 588.) [Sec. 236.]

### **Estoppel of Principal**

When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal cannot avoid the liability arising out of such acts or obligations if he has by his conduct or by words induced such outsiders (third parties) to believe that such acts, or obligations, were within the realm of the agent's authority. (*Pertab v. Marshall*, 26 Cal. 701.) [Sec. 237.]

### **Agent's misrepresentation**

For a misrepresentation by the agent, the principal is liable as if he had himself been guilty of it, if the misrepresentation was made in the ordinary course of business but not otherwise. (*Lloyds v. Grace Smith & Co.*, 1912 A. C. 716.) [Sec. 238.]

**CHAPTER XVIII**  
**THE LAW RELATING TO SALE OF GOODS!**  
**[THE INDIAN SALE OF GOODS ACT, 1930]**

**Introductory**

The Indian Sale of Goods Act, 1930, has taken important steps towards sufficiently clarifying and consolidating the law relating to sale of goods. The Act is not retrospective, *i.e.*, it does not affect transactions which took place before the day on which it came into force; it is prospective, *i.e.*, it affects transactions entered into on or after the date at which it came into force [Sec. 66.]

The Act has effected significant changes, and clarified the law of sale of goods thus:—

- (1) It has laid down a clear distinction between ‘sale’ and ‘agreement to sell’.
- (2) It has amplified and simplified the rules relating to stoppage in transit, delivery to carriers, auction sales, conditions and warranties.
- (3) The Act has given us clear rules relating to passage of property in the goods.

**DEFINITIONS AND EXPLANATIONS [Sec. 2]**

**Meaning of the term “Goods” [Sec. 2 (7)]**

Under Sec. 2 of the Indian Sale of Goods Act, “goods” means all kinds of **movable property (other than actionable claims and current money)**, and **growing crops**, and **things attached to or forming part of the land but under a contract to be severed from the land**. In English Law, stock and shares in a company are not regarded as goods, but under the Indian Law, shares and stock are regarded as goods. (*Fazal v. Mangaldas*, 46 Bom. 489.) Current money is not regarded as goods because it is the instrumentality through which goods can be bought. With regard to growing crops, grass, and things attached to or forming part of the land, such things are regarded as goods as soon as they are agreed to be separated from the land.

[An **actionable claim** means a claim (like a debt) which can be enforced by a suit or by legal action, but not otherwise.]

**Meaning of the term “Insolvent” [Sec. 2 (8)]**

Under the Insolvency Law, an “insolvent” is a person who is declared such by a competent Court of law ; but under the Sale



of Goods Act, the term “insolvent” has a wider meaning. For the purposes of the law relating to the sale of goods, as given in the Sale of Goods Act, an ‘insolvent’ means a person who is unable to pay his debts as they fall due, or who has ceased to pay his debts in the ordinary course of business. It is not at all necessary that he has been declared an insolvent under the Insolvency Law.

### **Meaning of the expression : Mercantile Agent [Sec. 2 (9)]**

A “mercantile agent” is an agent who, in the ordinary and customary course of his business as such agent, has the authority either to sell goods or to buy goods or to consign goods for sale or to raise money on the security of goods. Brokers, factors, auctioneers are mercantile agents.

### **Price [Sec. 2 (10)]**

“Price” means the consideration, in terms of money for the purchase of goods. The consideration moving from the seller is the parting with the commodity, and the consideration moving from the buyer is the payment of the price. (Volkart Bros. v. Vettivelu, 1887, 11 Mad. 459.)

### **Property [Sec. 2 (11)]**

Property in goods means not merely the general property in goods, but also the special property. When a thing is pledged, the general property remains with the pledgor, but the special property and possession are vested in the pledgee.

### **Quality of Goods**

“Quality of the goods” include their state or condition. [Sec. 2 (12)]

### **Seller**

A seller is any person who sells or agrees to sell goods. [Sec. 2 (13)]

### **Buyer**

✓ Any person who buys or agrees to buy goods is known as buyer. Sec. 2 1

### **Delivery [Sec. 2 (2)]**

A **voluntary** transfer of possession from one person to another is known as delivery. Delivery may be **actual**, *e.g.*, when a person actually hands over or delivers goods to another; or it may be **constructive**, *e.g.*, where a person is already holding the goods and is asked to hold them on as buyer or as pledgee or otherwise. Constructive delivery is said to be by way of **attornment**, when there is a

tripartite contract between the seller, the buyer, and a third party (e.g. the godown-keeper). The seller writes a letter to the godown-keeper and obtains his assent to hold the goods on behalf of the buyer. Constructive delivery may also be **symbolic**, e.g., when a thing is transferred or sold through a railway receipt or bill of lading or a warehouse keeper's certificate or a delivery order or some such other document of title to goods.

### **Meaning of the expression : Deliverable State [Sec. 2 (3)]**

Goods are said to be in a 'deliverable state' when they are in such a condition that the buyer would be bound to take delivery of them in accordance with the contract and cannot refuse to take delivery.

### **Document of title to Goods [Sec. 2 (4)]**

A document of title to goods is a document which entitles its possessor to get the goods mentioned in it, and/or, to transfer them by endorsement or by delivery; bills of lading, dock warrants, warehouse-keeper's certificates, railway receipts, warrants or orders for delivery of goods, are some examples of what are regarded as documents of title to goods.

## **FORM OF DOCK WARRANT**

No.....

.....Docks Company.

Dock lot.....

Date,

Warrant for.....imported in ship.....  
 (name of the ship) under master....., for the time being,  
 coming from.....(name of Port)  
 on the.....day of.....19 deliverable to  
 (name of consignee).....or his assigns by indorsement.  
 [Rent from.....till.....at,.....]

Mark.....Number.....Weight.....

Signature of Manager,

Signature of the Warrant clerk.

**Form of Warehouse-keeper's Certificate**

Reference No.....

Warrant for.....(state the quantity) of.....  
(state the name of the goods) entered in our books and held by us  
in our warehouse, subject to the conditions given on the back hereof,  
at the disposal of yourself or your assigns to whom you transfer the  
same.

Signature of the warehouseman  
or his agent or his servant.

**Form of Delivery Order**

Address of Seller,

Date

To

.....(name of the bailee or warehouseman or  
godown-keeper.)

.....his address.

Please deliver to.....(name of the buyer/s) or  
order the undermentioned goods ex.....(name of the  
vessel, or the railway company or the godown, as the case may be).

Description of the goods, with their brands, marks, labels etc.

.....  
.....  
.....

Signature of seller/s

**Future Goods [Sec. 2 (6)]**

Future goods are goods which are yet to be manufactured or  
produced or to be acquired by the seller after the making of the  
contract.

### Specific Goods.

Goods which have been **identified and agreed upon** at the time the contract is made are regarded as **specific goods**. [Sec. 2 ]

### Generic goods

**Generic goods**, as opposed to specific goods, are goods which have **not been identified** and agreed upon at the time the contract for sale is made ; generic goods are goods which are only **generally** described by their name (constituting their species) **and not actually identified**.

Where A agrees to sell and deliver to B at a specified date a certain number of bags of a commodity, say, wheat, **from his store-room**, the contract is one of **specific goods** ; and if his store-room gets burnt or the goods therein destroyed, without any fault on his part, the contract becomes frustrated, and A is not liable to B, for no longer being able to deliver the agreed bags of wheat—because the contract was **not** to deliver wheat, **generally**, (i.e. any wheat whatever) but **only the wheat in A's store-room**, and none else.

Where on the other hand A agrees to sell and deliver to B, say, 20 bags of wheat (**generally, i. e. without any reference to his own goods**—though he may have in mind his own goods) the contract is one for sale of **generic goods**. In such a case even if his own goods get lost or destroyed, without any fault on his part he is **bound to buy or procure the goods from elsewhere** (from some one else) and then deliver the same to the promisee (the buyer), because the contract is **not** for delivery out of his own stores, but is **generally** for delivery of the agreed quantity of the goods described by their distinctive name.

## FORMATION OF CONTRACT OF SALE

### Contract of Sale [Sec. 4]

A **contract of sale** of goods may be either (1) **a sale**, or (2) an **agreement to sell** at a **future date**. A **sale** takes place when there is agreement **plus a conveyance** of the property. On the other hand, when the conveyance is to **take place at a future date** it is an **agreement to sell**, but not sale. An agreement to sell becomes a sale when the time lapses or the conditions when it is to become a sale are fulfilled and the property in the goods has passed to the buyer. A sale is an **executed** contract, but an agreement to sell is an **executory** contract. In a sale, **because the property has passed**, the aggrieved seller can **sue** the buyer making a breach of contract **for the price** of the goods sold : but in an agreement to **sell**, because property has not yet passed, the aggrieved seller **can sue for damages only and not for the price** unless the price had to be paid at a stated date. In a sale,

because the property in the goods has passed from the seller to the buyer, the buyer must **bear any loss** which may take place in the goods even while they are in the custody or possession of the seller (provided there be no fault or negligence on the part of the seller); but in an agreement to sell, because the property in the goods has not yet passed to the buyer, any loss or damage will have to be borne by the seller and not the buyer.

There can be a contract of sale between a **part-owner** and another. A and B own a thing as part owners or joint-owners. A can sell to B his share in the property, making thereby B the sole owner of the goods. But otherwise than this the seller and the buyer cannot be the same person.

### **“Sale” and “analogous transactions”**

A sale should be distinguished from a gift or an exchange. In the case of sale there is the price consideration, but in a gift there is no pecuniary consideration. In order that a gift be perfect and effectual, it must be by **deed**. *Donatio perficitur possessione accipientis*. An exchange or a barter takes place when one type of goods gets exchanged with another type of goods and there is no money consideration.

### **“Sale” distinguished from “Hire-purchase”**

The distinction between sale and hire purchase is very important indeed. It is as follows :—

A sale takes place when the property in the goods concerned is transferred from the seller to the buyer, but in a hire purchase the transaction does not amount to a sale at all till the instalments payable towards the price of the goods are **paid in full**. A gives a piano to B on the hire purchase system. The price of the piano is to be paid in 12 monthly instalments. Now the question that arises is whether the transaction amounts to a sale or is a mere hire purchase. **It does amount to sale, if in the agreement, whereby the transaction is entered into, the hirer is not given any option to terminate the bailment of the piano and return the same whenever he likes to do so.** If, on the other hand, the hire purchase agreement **does contain a clause for terminating the bailment and returning the hired goods, the transaction is a hire purchase, and not a sale.** The words used **do not matter** ; it is the application of the test, *viz.*, of the presence or absence of the clause in the agreement giving the hirer, or the purchaser, as the case may be, the option to terminate the bailment and return the goods. (*Bhimji v. Bombay Trust Corporation*, 32 Bom. L. R. 64, following the English decision in *Lee v. Butler*, 1893, 2 Q. B. 318.) The substance of the agreement should be construed

**Transfer of title from the seller to the buyer [Secs. 27-30]**

The general rule of law is : *nemo dat qui non habet*, i.e., "none can give or transfer who does not himself possess". If a person has no right or title to goods he cannot sell or pledge them or transfer them to any one else. There are, however, exceptions to this rule of law, based on the grounds of equity, convenience and fairness towards innocent third parties, taking the goods for valuable consideration. The exceptions are as follows :—

- (1) When a person, for **value** and **without notice** of the **fact that the seller has no right to sell**, buys goods from a seller **who is a mercantile agent**, he gets a good title to the goods **even though the mercantile agent has no authority to sell them**, provided the mercantile agent is with **the consent of the owner** in possession of the goods or of documents of title to the goods at the time of the sale and provided he acted in the ordinary course of his business of a mercantile agent. [Sec. 27]
- (2) Where an innocent person for value acting in good faith buys goods from a co-owner who has no authority to sell the goods, the innocent purchaser gets a good title to the goods, **provided the co-owner who sells the goods had the sole possession** of the goods by **consent** of the other co-owner or co-owners. [Sec. 28]
- (3) An innocent purchaser for value buying goods from a person who has **obtained them under a voidable contract**, i.e., a contract obtained by fraud, undue influence, coercion or misrepresentation, can get a good title to the goods, provided the person who obtained them under the voidable contract sold them away to him before the contract had been rescinded by the party aggrieved. [Sec. 29]
- (4) When a person, having sold the goods, is in possession of them or of the documents of title to them, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods sold or of the documents of title to the goods sold under any sale or pledge or other disposition thereof to any person, who receives the same in good faith and without notice of the previous sale, shall have the same legal effect, as if the person making the delivery or transfer had been expressly authorised by the owner of the goods to make the same. [Sec. 30(1)]

- (5) When a person having bought or agreed to buy goods, obtains, with the seller's consent, possession of the goods or the documents of title to them, the delivery or transfer by him or by a mercantile agent acting for him, of the goods or documents of title, under any sale or pledge, or other disposition thereto to any person receiving the same in good faith and without notice of any lien or other right of the original seller with regard to the goods, shall have the same legal effect as it would have had if such lien or right had not existed. [Sec. 30 (2)]

### **SOME CASES AND EXPLANATIONS RELATING TO TRANSFER OF TITLE**

#### **Re : The Rule : Nemo dat qui (quod) non habet**

Unless a person has ownership of the goods, or the right to sell the goods, that he has sold or is selling, the sale can be of no effect, and the true owner can impeach the title of the purchaser, even though the purchaser may have acted in good faith and given sufficient consideration, for the rule is : *nemo dat qui (quod) non habet*, i.e., none can give who possesses not. A thief cannot give good title to anyone. (See the case of the Motorists' Advisory Agency Ltd., 1923, 1. K. B. 577.)

### **EXCEPTIONS TO THE RULE : NEMO DAT QUI (QUOD) NON HABET**

#### **Passage of Title by Estoppel due to Owner's Conduct**

If the owner of the goods trusted a particular person, and **voluntarily** left the goods with him, under such circumstances that the members of the public could understand that that person had the authority to sell the goods, the owner is estopped from pleading want of authority of that person to sell those goods. If the owner of the goods by his conduct gives a third person to honestly believe that the person with whom the goods have been left has the authority to sell the goods, then the owner would clearly be, and reasonably speaking ought to be, estopped from pleading that the seller had no authority to sell the goods.

#### **Sale by Mercantile Agent**

A sale by a **mercantile agent in possession** of goods or of document of title to goods gives the buyer a good title, if the buyer bought the goods **in good faith**, without any suspicion, or reasons for suspicion, and **for valuable consideration**, and **in the ordinary course of the business of the mercantile agent**, even though his authority to sell

**as a whole** with the intention of the parties thus determined by reference to the context. If the transaction amounts to a sale, the seller cannot get back the thing by reason of the non-payment of an instalment, but can only bring a suit for recovery of moneys due payable. (*Bhimji v. Bombay Trust Corporation*, 1930, 32 Bom. L. R. 64.) If on the other hand, the transaction does not amount to a sale, but is a mere hire purchase, the hirer is liable to lose his article which the owner is entitled to take away from him, in addition to his (the owner's) right to sue for the default made by the hirer.

### **Conditions usually included in a hire purchase agreement**

The conditions usually found in a hire purchase agreement include : (1) the statement that the transaction is a hire-purchase and not a sale ; (2) the particulars of the goods bailed on hire ; (3) the stipulations as regards delivery of the goods to the hirer ; (4) the moneys payable at instalments and the number of instalments ; (5) the stipulation regarding the keeping of the goods in good condition and the conditions relating to the user of the goods ; (6) rights of the owner or bailor in case any instalment is not paid ; and (7) the **most essential condition which distinguishes a hire-purchase from a sale or a delayed-payment-basis sale—viz., that the hirer (bailor) shall at any time at his option be entitled to terminate the bailment and return the goods to the owner ; if this clause is not contained in the agreement, the agreement becomes one of sale though described as a hire-purchase and though expressly declared to be not a contract of sale.** (*Bhimji v. Bombay Trust Corporation*, 32 Bom. 64.)

### **“Sale of goods” distinguished from “work and labour”**

A contract of sale of goods is one in which some goods are sold or are to be sold for a price. But where **no goods are sold**, but there is only the doing or rendering of some work, or labour, then the contract is **only of work and labour**, and not of sale of goods.

A, a dentist gives B a set of artificial teeth **made from his own material**. A has sold goods to B. But where A, the dentist, does only clean B's teeth, without using any material of his own, A is said to have given only work and labour.

A, a writer, writes a text book on Secretarial Practice. It is **all a sale of goods**, though the book may have been **different without A's intelligence and labour**. It is not work and labour.

An M. D., consulting physician, gives a prescription (**without selling any medicine**) ; it is work and labour and not sale of goods. But if a physician is not a consulting physician but is one who **sells medicine**, e.g., compounding it in his dispensary, he is said to be **selling goods and not merely rendering work and labour**.



Whenever, goods are sold, in the transaction, there is a sale of goods, and not mere work and labour. Thus if A, a painter, paints a portrait of X, he (A) is said to have rendered work and labour, and not to have sold goods, if, in painting the picture he exercised his skill but did not use or give any goods or materials. If the painter used not his own colours and canvas but the canvas or colours supplied by the customer, then the painter is said to have given work and labour, and nothing else. But if the painter used his own materials such as canvas and colours, then the painter can be said to have supplied goods. The same applies to the case of a sculptor also. If the marble or bronze is supplied by the sculptor, then he is giving goods and materials; but if the same be supplied by the customer, the sculptor uses only his own skill and labour and does not supply goods.

This **differentiation** between 'work and labour' and 'sale of goods' is of great importance in English law, though not so in India. In England a contract of sale of goods requires to be in writing or requires some sort of writing as evidence of its existence, if the value of the goods is equivalent to £10 or upwards. Otherwise the contract, though otherwise valid, is unenforceable at law. In India, however, no such writing is obligatory for an enforceable contract. In England, unless the buyer gives something as earnest money, or makes a part payment or unless the buyer actually receives the goods or a portion of the goods, the contract is not enforceable at law, if it is of sale of goods of the value of £10 or more and if it is not in writing or is not supported by any note to show its existence.

### Essentials of a sale

The essentials of a sale are :—

- (1) Parties must be **competent to contract** as required under the Indian Contract Act ;
- (2) there must be **consent**, *i.e.*, the parties must understand the same thing in the same sense ;
- (3) there must be **something as the subject matter** of the sale in which the property is transferred from the seller to the buyer ;
- (4) there must be a **price** as money consideration paid or promised to be paid.

### Essentials of an agreement to sell

In the case of an agreement to sell, the parties must be **competent to contract** ; there must be **mutual consent and money consideration known as price**, and a **thing** in which the property is agreed to be transferred at a future date.

### Clauses to be included in a contract of sale of goods

The usual clauses in a contract of sale of goods include those regarding (1) the time of delivery of the goods, (2) the time of payment of the price, (3) **express stipulations in the nature of conditions**.

and warranties, (4) stipulations as regards the quality of the goods and their condition, (5) valuation, if any, (6) stipulations as regards acceptance and inspection of the goods, (7) conformity with the description under the contract, in case of sale by description, (8) regarding conformity with sample, where the contract is by sample, (9) regarding the time of passage of property from the seller to the buyer, (10) provisions as regards the passage of risk, (11) stipulation regarding the right of resale and lien.

### **Formalities of Contract of Sale [Sec. 5]**

A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The delivery of the goods may be present or future ; likewise, the payment of the price may be present or future. A contract of sale may be made orally, or in writing, or partly in writing and partly orally, or it may be implied from the conduct of the parties and the circumstances of the case.

No special form is required for the validity of the contract. (Durga Prasad v. Lall, 31 Cal. 614.)

[Under the English Law, when a contract for sale of goods is such that the value of the goods is £ 10 or more the contract must be in writing, or a note or memorandum of it must be in writing to witness the existence of such a contract, or there must be payment of earnest, or delivery or part delivery of the goods, or part payment. But in Indian Law there is no such requirement.]

### **Subject matter of contract of sale of goods [Sec. 6.]**

The goods, being the subject matter of the contract of sale, may be existing goods, *i.e.* present goods, or **even future goods** *i.e.* goods to be ascertained or to be made yet. (Mulchand v. Kundanmall, 47 Cal. 458.)

A contract for sale of goods can also be with regard to goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

When the seller purports by his contract of sale to effect a present sale of future goods, the contract operates only as an agreement to sell the goods and not as sale.

## **EFFECT OF LOSS OF GOODS**

### **Goods perishing before contract is entered into**

In the case of a contract for sale of **specific** goods, the contract is void if the goods, without the knowledge of the seller, have perished or become so damaged as no longer to answer to the description by which they are known. Sec. 7. (Hastley v. Conturier, 1853, 5 H. L. Cas. 673.) See also Ahmedabad Municipality v. Sulemanji, 27 Bom. 619.

### Goods perishing before sale but after agreement to sell

When there is an agreement to sell **specific** goods, *i.e.* ascertained goods like goods in a particular godown, and **subsequently** without any fault of the seller or the buyer the goods perish or become so damaged as no longer to answer the description by which they are **known** the agreement becomes avoided. This, however, does not apply to C. I. F. contracts—in which the price must be paid even if the goods are lost or destroyed. [Sec. 8].

A agrees to sell to B 100 bags of flour which are in his store room. Before the date at which these bags are to be delivered they got destroyed without any fault of the seller or the buyer. The agreement is now at an end and no party thereto is liable thereunder. On the other hand, if A had agreed **generally**, *i.e.*, without reference to any particular goods, to deliver 100 bags of flour, he would have been liable to B to deliver to him these 100 bags by buying them elsewhere if his own 100 bags got destroyed. In this case, *i.e.*, the later case, the contract is for the sale of **generic goods** or **unascertained** goods and not for the sale of specific or ascertained goods. It may however be noted that with regard to C. I. F. contract (contracts in which the price payable includes **cost, insurance and freight**), the contract does not become avoided by loss or destruction of goods before sale and after agreement to sell, because a C. I. F. contract is one in which the buyer is bound to pay the price even if the goods are lost or destroyed, provided he gets the proper documents of title to the goods and a good insurance policy.

[C. I. F. contracts are sometimes spoken of as contracts for sale of documents, but it is **more accurate** to describe them as contracts for sale of goods through documents.]

### Ascertainment of Price [Secs. 9, 10]

The price in a contract of sale may be ascertained by the contract itself, or subsequently in the manner laid down by the contract, or as determined by the course of dealing between the parties. Where no price has been determined, the law says that the buyer shall pay the seller a **reasonable** price. As to what is a reasonable price is a question of **fact** dependant on the circumstances of each particular case. Reasonable price does not mean necessarily the market or current price if that be very high at the time due to unusual or accidental causes. (*Acebal v. Levy*, 1834, 10 Bing. 376.) [Sec. 9].

When the agreement to sell says that the price shall be fixed or determined by the valuation made by a third party, it shall be fixed by that third party. If such third party cannot or does not make the valuation, the agreement stands avoided; provided that if the goods or any portion of the goods have already been delivered

to the buyer and appropriated by the buyer, the buyer shall pay a reasonable value (*quantum valebant*) for such appropriation. Where the third party who is to value the goods is prevented from making the valuation by reason of a fault of the seller or the buyer, the party not in fault can recover damages from the party in fault, but if the property in the goods is already passed to the buyer, the party in wrong must pay a **reasonable price**. [Sec. 10]

### Conditions and Warranties—Definitions

A **condition** is a term or stipulation in a contract of sale of goods, which is **so essential** to the fulfilment of the contract that a breach of it will give the aggrieved party a right to **repudiate** the agreement itself, and not merely sue for damages. On the other hand, a **warranty** is a stipulation, in a contract of sale of goods, which is **not so essential** to the fulfilment of the contract, but which is collateral to the contract, giving the aggrieved party a right to **sue for damages but not to avoid the agreement itself**. [Sec 12]

A breach of condition causes irreparable damage to the aggrieved party so as to entitle him to end the agreement, but a breach of warranty causes only such damage as can be compensated for by damages.

As to whether a stipulation is in the nature of a condition or a warranty, will depend on the **terms** of the contract and the **intention** of the parties. If the stipulation is such that its breach would be fatal to the rights of the aggrieved party, then such a stipulation is in the nature of a condition and not a mere warranty. On the other hand, if the stipulation is not so of the essence of the contract, the aggrieved party can at the most sue for damages for any damage suffered by him.

### Conditions and Warranties [Secs. 16-17]

[Conditions and Warranties may be **expressed or implied**. They are said to be express when at the will of the parties they are inserted in the agreement ; they are said to be implied when the law deems their existence in the contract even without their actually having been put in the contract. **An express condition or warranty can negative or take away an implied condition or warranty**. The Latin maxim is : *Expressum Facit cessare tacitum*, i.e., what is expressly done puts a cessation to what is tacit.]

**The implied warranties in a contract of sale are as follows :—**

- (1) That the buyer shall have **quiet and peaceful possession** of the goods sold to him. [Sec. 14 (b)]
- (2) That the goods sold are free from encumbrance or charge in favour of any third party not declared or known to the buyer before or at the time the contract was made. [Sec. 14 (c)]

- (3) That the goods are fit when such term is annexed by usage or custom of trade. [Sec. 16 (3)]

**The implied conditions in a contract of sale of goods are as follows:—**

- (1) That, in a sale, the seller **has the right to sell**, and that in the case of an agreement to sell **he will get that right to sell the goods at the time the property is agreed to pass** to the buyer. [Sec. 14 (a)]
- (2) That, as a rule, in all **mercantile** transactions the **delivery** of the goods shall not be delayed. But there is no implied condition that the price shall be paid in time or without delay ; such a condition can be inserted expressly. [Sec. 11]
- (3) That in the case of a contract for sale of goods by **description** (Sec. 15) there is an implied condition that the goods when made or when shown to the buyer shall be in accordance with the buyer's description ; and, if the **sale is by sample** and description, not only should the goods be in accordance with the description given by the buyer but also the bulk of the goods must correspond with the sample ; and the buyer must have a reasonable opportunity of comparing the bulk with the sample and of satisfying himself as to the quality, and there must not be a latent defect. [Sec. 17]
- (4) Subject to any custom or agreement to the contrary, there is **no implied condition or warranty** that the goods shall be fit for the purpose for which they are bought, unless the buyer has bought them **from a manufacturer or a dealer in such goods and has relied on the latter's skill and judgment** in the selection of the goods. Ordinarily the doctrine of '**Caveat Emptor**' prevails, *i.e.*, "beware buyer" or **the buyer must beware**. He who buys goods buys them with his eyes open, and the seller is not liable if the goods do not happen to be fit for the particular purpose for which the buyer has bought them. But to this there is a well known exception given in the Indian Sale of Goods Act, which says that where the buyer, **expressly or impliedly, makes known to the seller the particular purpose for which the goods are required**, and tells him **that he is relying on the seller's skill or judgment in the selection of such goods**, and the goods are of the description **which it is within the business of the seller to deal in**, the goods must be reasonably fit

for the purpose for which they are bought. It is further provided that where a specified article is bought **under its patent or trade name**, there will be **no implied condition as to its fitness for any particular purpose**; because then the buyer is not relying on the seller's skill, but is **buying the goods on the strength of its reputation**. But it may nevertheless be that though the buyer buys the goods under its patent or other trade name, he still consults the seller with regard to the fitness of such goods; and he may rely on the seller's skill and judgment regarding the fitness or otherwise of those goods, and in such a case there will be an implied condition that the goods shall be fit for the particular purpose for which they are wanted. [Sec. 16]

- (5) When goods are bought **by description** from a seller who deals in such goods, there is also an implied condition that the goods shall be **merchantable**, *i.e.*, they shall be capable of being readily sold at the market and good enough, unless the buyer has examined the goods and such examination has revealed, or ought to have revealed, to the buyer the defect. And the buyer must have **reasonable opportunity of examining the goods and of satisfying himself that the same are in accordance with the description given in the contract**. [Sec. 16 (2)]
- (6) An implied condition as to quality or fitness for a particular purpose may also be fixed or annexed by the usage of trade in the locality concerned. [Sec. 16 (3)]

[An express warranty or condition does not negative an implied warranty or condition, unless it is expressly made to negative such warranty or condition, by being inconsistent to it, or unless the express warranty or condition is inconsistent with an implied warranty or condition. *Expressum facit cessare tacitum* (what is expressly provided overrides what is tacit or implied.))] Sec. 62.

## CASES REGARDING CONDITIONS AND WARRANTIES

### Regarding seller's right to sell

A bought a car from B who had no title to it. A used it for several months. After that the true owner came forward and demanded the car. Held that A was bound to hand it over to the true owner, and that A could successfully sue B for the recovery of the purchase price, even though several months had passed, because there was a breach by B of an implied condition in the sale of the car, *viz.*, that the seller must have the right to sell the goods. (*Rowland v. Divall*, 1923, 2 K. B. 500.)

As shares and stock of companies, are, under the Indian Law, goods, there is an implied undertaking in a contract of sale of shares, that the shares shall be free from any incumbrance or charge in favour of any third party, unless the same was made known to the buyer at the time he bought the shares or before the contract was completed. (*Kissenchand v. Rampratap*, 1940, 44 C. W. N. 505.)

Where goods are sent by the seller to the buyer and it is found that because the goods bore a brand which was an infringement of a registered trade mark of another manufacturer the customs authorities detained the goods, the buyer has the right to repudiate the transaction on the ground that there was a breach of the implied condition that the seller must have the right to sell. (*Niblett v. Confectioners' Materials Co. Ltd.*, 1921, 3 K. B. 387.)

### Regarding sale by description

Goods must bear the stipulated description or the label or the particular brand where the contract by description has specified the brand or the label; if the goods supplied then by the seller do not bear the brand or the label the buyer is not bound to accept delivery, as there is a breach of the implied condition that the goods must be in accordance with the description and of the specified type or brand. (*Scaliaris v. Ofverberg & Co.*, 1921, 37 T. L. R. 307.) But if the contract is for the sale of goods of a certain type and bearing certain numbers, the buyer cannot refuse to take the goods even if the goods bear numbers different to those specified in the contract, provided the goods are of the stipulated quality, if according to the contract what is required is the **specified quality** and numbers are not an essential condition of the contract. (*Ramjivan v. Bhikaji*, 1924, 48 Bom. 519.) But the manufacturer of goods is bound to supply the goods **made by him** and not those of any other maker though the goods of that other make may be as good as the goods made by him. (*Johnson v. Raylton*, 7 Q. B. D. 438.)

A entered the licensed premises of B, and ordered out a bottle of Stone's ginger beer. As A was attempting to open the bottle by drawing the cork out the bottle broke at the neck and A was injured as the result thereof. It was held that A was entitled to damages because B, though not a manufacturer, was yet a dealer in those goods, and there was a breach of an implied condition that the goods must be merchantable. The bottle was not fit to hold the ginger beer, **and the contract being one of sale by description**, the seller was liable. (*Morelli v. Fitch & Gibbons*, 1928, 2 K. B. 636.)

Where goods (skins) were bought under a contract of sale by description, and the contract provided that the goods should be according to the description and should be passed by the buyer, and actually the goods were passed by the buyer, but later discovered to be defective when they were put to use, it was held that

though the buyer had previously approved the goods, yet, because the contract was for sale of goods by description, the buyer could plead that the goods were not merchantable and could counterclaim for damages even though the seller may have sued him for the price. There was a breach of an implied condition that the goods shall be merchantable, because the contract was for sale by description. (*Khoyee & Co. v. G. W. & Co. Ltd.*, 1937, 2 Mad. L. J. 131.)

A sold a car to B, under a contract of sale by description. There were certain defects in the car which were not apparent at the time of the contract and which on a reasonable examination could not be discovered. Held that as these defects had made the goods (the car) unmerchantable, and as the contract was for sale by description, there was a breach of the implied condition that the goods must not have any defects that on a reasonable examination could not be discovered. (*McKenzie & Co.*, 1945, 50 C. W. N. 213.)

## THE DOCTRINE OF 'CAVEAT EMPTOR', AND THE EXCEPTIONS TO IT

### RELYING ON SELLER'S SKILL AND JUDGMENT

#### Buying of goods under their Patent or Trade-name

By the doctrine of 'Caveat Emptor' (Beware buyer) is meant that the person who buys goods must keep his eyes open, his mind active and cautious while buying the goods. If he makes a bad choice, he must thank himself for his own lack of skill, lethargy of folly, in the absence of any misrepresentation or guarantee by the seller.

The doctrine of Caveat Emptor is subject to the following exceptions :—

1. Where the seller makes a false representation (*a suggestio falsi*) and the buyer relies on it, the buyer is entitled to the goods according to that representation.
2. When the seller did **actively conceal** a defect in the goods, so that on a reasonable examination the same could not be discovered, the buyer can avoid the agreement and claim damages. For example, A has a horse with a hole in the hoof. A so fills it up that the defect could not be discovered on a reasonable examination. A is guilty of fraud, when he successfully induces the buyer to buy the animal. Or
3. Where the buyer, **relying upon the skill and judgment of the seller**, who is a manufacturer or dealer in the goods of the type sold by him to the buyer, has expressly or



impliedly **communicated to him the purpose** for which the goods are required, there is an implied condition that the goods shall be fit for the purpose for which they are required. (*Permain Co. v. Webb & Co.*, 1922, 1 K. B. 55.)

The purpose for which the goods are required by the buyer must be communicated to the seller ; but the communication **may be implied**, *e.g.*, where the goods bought are usable for one purpose only. Thus where a person bought from a chemist a hot water bottle and the bottle broke and injured him it was held that the seller, though not a manufacturer of the article, was liable as a dealer in the article, for the purpose for which the hot water bottle was required was impliedly communicated to the chemist. . When a thing is required for one purpose only, the seller is always supposed to know what it is required or usable for. (*Priest v. Last*, 1903, 2 K. B. 148.)

In *Manchester Liners Ltd. v. Rea, Ltd.*, 1922, 2 A. C. 74, the plaintiff shipping Company had entered into a contract whereby the defendant had promised to supply suitable coal for bunkering their steamship. At the time the parties entered into the contract, there was, to the knowledge of both the parties, a control on coal. The defendant, instead of supplying the plaintiff company with the suitable coal required for bunkering up its vessel, supplied coal which was not suitable for the plaintiff's ship. The plaintiff Company was held entitled to sue for damages in so far as they had relied on the defendant's skill and judgment for the supply of **suitable coal for bunkering their ship**.

Where the goods are bought **under their patent or trade name**, there is no implied condition that the goods shall be fit for the particular purpose for which they are required as specified goods, because the buyer, in such a case, is not relying on the skill or judgment of the seller, but is relying on the reputation which the goods have acquired, having them under their patent or trade name. (*Jones v. Just*, 1868, L. R. 3 Q. B. 202.) (See also *Joseph v. Bushen*, 1938, 2 Cal. 88.)

Where the buyer wrote to the seller : "Please send me your patent cotton cleaning machine," and the seller sent it, it was held that the only condition implied in the contract was that it must be the **seller's** patent cotton cleaning machine ; there could not be implied any condition that the goods must be fit for the purpose of cleaning cotton, because the contract was one for purchase of a commodity under its patent name. But where the buyer buys goods under their trade name or patent **and yet relies on the skill and judgment of the seller by expressly letting him know that he does so**, there shall be an implied condition that the goods shall be fit for the particular

purpose for which the same are wanted. This is so though the goods have been bought under their trade name or patent. See *Baldry v. Marshall*, 1925, 1 K. B. 260 ; *Prideaux v. Bunnet*, 1857, 1 C. B. N. S. 613.)

### **Transfer of property from seller to buyer [Secs. 18-25]**

The important question that arises is: When does the property in the goods pass from the seller to the buyer? The answer to that question is that the primary rule regarding the transfer of property is that property passes **as and when intended to pass**. The intention of the parties to the contract is very material in determining the time when the property passes from the seller to the buyer. See 19. **In the absence of any intention revealed in the contract**, the law lays down rules relating to such transfer of property. Those rules are as follows:—

- (1) Whenever there is a contract for sale of goods which have not been ascertained, property in the goods does not pass to the buyer unless and until the goods are ascertained. [Sec. 18].
- (2) In the case of specific goods in a deliverable state, under an unconditional contract for sale, the property in the goods passes to the buyer as soon as the contract is made, and it is immaterial whether the time of payment of the price or of delivery of the goods, or both, is postponed. [Sec. 20].
- (3) In the case of a contract for sale of specific goods in a deliverable state, if the seller has got to do something to them, for example, to weigh, measure or test the goods for ascertaining the price, the property in the goods does not pass until such weighing, measuring, testing or other act required to be done has been done and the buyer has got notice that that act has been done. [Sec. 22].
- (4) In the case of a contract of sale of specific goods if the seller is bound to do something to the goods for putting them in a deliverable state, no property passes to the buyer until such thing is done and the buyer has received notice to that effect. [Sec. 21].
- (5) Where there is a contract of sale of unascertained or future goods sold by description, property passes to the buyer when the goods according to the contract are unconditionally appropriated to the contract (and are in a deliverable state) either by the seller with the

assent of the buyer, or by the buyer with the assent of the seller. Such assent may be express or implied, and may be given either before or after the appropriation is made. [Sec. 23 (1)].

- (6) When, in pursuance of the contract of sale of goods, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for transmission to the buyer, the seller is deemed to have unconditionally appropriated the goods to the contract, unless the seller has reserved what is known as the **jus disponendi**, *i.e.*, the right of disposal over the goods. [The right of disposal is reserved in the ways mentioned in point (8) below.] [Sec. 23 (2)].
- (7) When goods are delivered to the buyer on approval or jangad, *i.e.*, on sale or return, property in the goods passes to the buyer when he signifies that he approves or accepts the goods or if he retains the goods without giving notice that they are rejected and the time agreed for returning the goods has expired or a reasonable period of time has expired since the goods were delivered. [But the person who rejects the goods is not, in the absence of a contract to the contrary, bound to return the goods; he has only to ask the seller to take them away. [(Buch Co. v. Govardhandas, 24 Bom. L. R. 991.)] Sec. 24.
- (8) When the seller retains **the right of disposal of the goods** (the *jus disponendi* over the goods) which he has sent to the buyer by delivering them to a carrier, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled by the buyer. The seller, while sending the goods through a carrier or other bailee for transmission to the buyer, may impose a condition that if the buyer is to accept the goods he must honour the bill of exchange which the seller has sent along with the goods. In such a case the buyer is bound to return the bill of lading if he does not accept the bill of exchange, and if he wrongfully keeps with him the bill of lading, the property in the goods does not pass to him (the buyer). The **jus disponendi** can also be reserved by the seller so shipping the goods that by the bill of lading they are made deliverable to his agent or branch at the place of destination. [Sec. 25].

## IMPORTANT CASES AND ILLUSTRATIONS RE : TRANSFER OF PROPERTY IN GOODS FROM SELLER TO BUYER

### Property passes when intended to pass

A agrees to sell to B, for a specified price, a ship lying in his (A's) yard. The ship **has, under the contract, to be rigged and fitted for voyage**. The property passes as soon as the ship is, as required by the contract, fitted after it is rigged, so as to be ready for the voyage. (*Laing & Sons v. Barclay Co.*, 1908 A. C. 35.)

An engine is sold "free on rail". Before it could be delivered free on rail, it was damaged accidentally, and the buyer refused to take delivery of it in its damaged state. As the property had not passed from the seller to the buyer, the buyer was held entitled to reject the goods; the risk had not passed to the buyer. **The contract was for delivery of the engine "free on rail"**, and unless and until it was so delivered, it could not be said that the property had passed to the buyer. (*Underwood Ltd. v. Burgh Castle Brick Cement Syndicate*, 1922, 1 K. B. 343.)

### Passage of property in case of Specific Goods in Deliverable State

X offers to sell to Y his radiogram at Rs. 1,500. Y accepts the offer. Immediately the offer is accepted the property in the radiogram passes to Y. And it makes no difference even if the price is to be paid later or the delivery is postponed to a stated day or even if the goods are sold on credit, because the contract is an **unconditional** one for sale of **specific goods** in a **deliverable state**. The property passes immediately the contract is made.

A agreed to sell to B a **specified** quantity of hay at a **specified** price payable on the day mentioned in the contract of sale. The hay, under the contract, was allowed to remain on the premises of the seller for almost three months after the day of the payment of the price. As the contract was an **unconditional** one for sale of **specific goods** in a **deliverable state**, the property in the goods immediately on the making of the contract passed to the buyer. (*Tarling v. Baxter*, 6 B. C. 360.)

### Passage of property in case of Unascertained Goods

A agrees to sell to B 50 maunds of rice **out of a larger quantity** lying in A's granary. The agreed price is to be paid on the day appointed under the contract. Unless and until the required quantity of 50 maunds is separated from the larger quantity **and the goods have thus been ascertained**, property cannot pass from the seller to the buyer. Even though the seller may have given the buyer the delivery order, duly endorsed to him, the property does not pass **till ascertainment** of the contract goods. (*Laurie & Morewood v. Dudin Sons*, 1926, 1 K. B. 223.) See also *Shamji v. N. W. Rly.*, 48 Bom. L. R. 698.

In the case of unascertained goods or future goods by description, property passes to the buyer when goods of that description in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller.

X has a large quantity of flour in his store-room. He agrees to sell to Y a **specified** quantity out of this larger quantity. Unless the specified quantity is separated from the larger, and notice is given by the seller to the buyer that the flour is ready for delivery and that the buyer should arrange to take the delivery of the same, and unless the buyer then agrees to take the same away, or unless the buyer has approved the goods and, having found them according to the description, tells the seller that he will take them away and the seller agrees to the same, the property in the flour does not and cannot pass to the buyer.

In *Aldridge v. Johnson*, 7 E. & B. 885, A agreed to sell to B, at a specified price payable at the agreed date, 50 maunds of rice out of a larger quantity in A's granary. B had, under the contract, to send sacks to contain the rice, and A had to put the rice into the sacks. A then put the 50 maunds of rice in the bags actually sent to him by B the buyer. The property in the rice passed to the buyer when the seller filled the bags with the required quantity of rice.

### **Delivery to Carrier—Passage of Property in the Goods**

A, a Bombay merchant, contracts to buy 50 hogsheads of sugar from a merchant in Karachi. The Karachi merchant then delivers the same to a carrier at Karachi to carry them to Bombay. The Karachi seller is deemed to have unconditionally appropriated the goods to the contract. Even if the goods do not reach the Bombay buyer, he (the buyer) would be responsible for the price. In this connection see the Bombay case: *Ford Automobiles v. Delhi Motor Co.*, (24 Bom. L. R. 1146). But if, while delivering the goods to the carrier, the seller **reserves the *jus disponendi***, by taking the document of title to the goods to his own name or the name of his correspondent or servant, or by sending along with the document of title a bill of exchange, then the property in the goods does not pass from the seller to the buyer upon delivery of the goods to the carrier, **but only after the buyer or his agent or servant has paid the price or honoured the bill of exchange or satisfied the condition laid down by the seller.** (*Ford Automobiles v. Delhi Motor Co.*, 24 Bom. L. R. 1146.)

### **Passage of property in case of Sale on Approval, or Sale or Return. Sale on Jangad**

A delivers a book on Mercantile Law to B, on sale or return basis. A allows B latitude of time, *viz.*, twenty days to decide whe-

ther he would have the book or not. If B keeps the book after the limit of twenty days gets over, without informing A that he has disapproved the book and that A should arrange to take it away, B will become liable for the price, as the property in the book will be deemed to have passed to B upon the lapse of the twenty days. If B does not want to buy the book, he must inform the seller accordingly. In the absence of a stipulation to the contrary, B is not bound to send the goods back, though he is bound to inform the sender that he does not want the goods and that the sender should take them away.

A sent a piano to B on sale or return. After a week from the date of its receipt by B, B pledged the piano as security for repayment of a loan advanced by X to B. Does X get a good pledge? Or can A take away the goods from X? X gets a good pledge, because when B made the pledge, B could be deemed to have elected to buy the goods (the piano) sent to him by A. When the person to whom the goods are sent on approval does anything to the goods which goes to show that he has accepted them, or when he consumes or deals with the same so as to show that he has become the owner thereof, property undoubtedly passes from the seller to the buyer. But where it is stipulated by contract that the property in the goods, sent on sale or return, shall not pass to the buyer before a stipulated date at which the goods have to be paid for, then no property will pass till the payment of the price on that day. If before the payment of the price on the stipulated day, the buyer wrongfully pledges the goods, the pledgee cannot get a good pledge, because the property had not passed to the buyer and he had, therefore, no right to pledge the goods. (*Nemo dat quod non habet*, i.e., none can give or transfer who possesses not himself.) (See *Kempler v. Bravingston*, 1925, L. T. 680.)

Customs and conventions, however, override the law (*Modus et conventio vincunt legem*). Thus in the case of the **fur trade** there is a custom that the person who orders out fur articles does so at his own risk and peril, and that even if the goods are taken possession of by burglars, in the course of the transit, the person who ordered them on approval will be liable to pay the invoice price to the seller. (*Brevington v. Dale*, 1902, 7 Com. Cas. 112.) This is so even though no property has passed from the seller to the buyer.

### Transfer of Risk—Payment of Price

An important question turns on whether the property is passed to the buyer or not. If the property passes to the buyer, the responsibility with regard to the goods passes to buyer; any loss or damage to the goods is, as a general rule, to be borne then by the buyer; and the seller can sue for the price. If on the other hand, no property has passed to the buyer, the property in the goods being

still with the seller, the loss or damage to the goods will, as a rule, fall on the seller, and not the buyer ; and the seller cannot sue for the price if there is a breach of contract but can sue for damages only, unless the price was agreed to be paid on a specified day even in spite of the property not having passed to the buyer. [Sec. 26].

Unless otherwise agreed by a contract between the parties, goods remain at the seller's risk until the property therein is transferred to the buyer ; but when the property is transferred to the buyer, the goods are at the buyer's risk whether they have been delivered to the buyer or not. But when delivery has been delayed through the fault of either the buyer or the seller, the goods are at the risk of the party in fault as regards any loss which may not have occurred but for such delay or fault. [In the case of fur goods, there is a custom that he who orders out the same shall do so at his own risk, though no property passed to the buyer. (*Brevington v. Dale*, 1902, 7 Com. Cas. 112.) Sec. 26.

## FORM

### OF

#### Notice regarding appropriation of goods under a contract of sale of goods

Address of seller

Date,

To

....(Name of buyer,

.....and his address)

Dear Sir,

I/We hereby give you notice (or, write—beg to inform you) that we have this day set apart and appropriated to the contract between us, dated the.....day of.....19 , and that the same we have now kept ready to be delivered to you or your agent or servant, in that behalf empowered ; delivery can be taken at any time between the hours of.....and..... in the forenoon and between.....and.....in the afternoon.

Yours faithfully,

(Signature of Seller/Sellers)

had been taken away by the owner and though he was asked only to pledge the goods. (See the case of *Amritlal v. Bhagwandas*, 1938, 41 Bom. L. R. 609.)

A, a trader, entrusts with B, his mercantile agent, a document of title, *viz.*, a bill of lading relating to certain goods, with instructions that B should not sell the goods at less than the specified price and that he should not sell on credit. B, in spite of these instructions, sells the goods below the specified price and gives the buyer three months' credit. The buyer gets a good title, in case of his having paid the price and acted without notice that the mercantile agent had not the authority to sell in the way he did. (*Lowther v. Harris*, 1927, 1 K. B. 393.)

### Sale by a Co-owner

In England, sale by a co-owner, without the consent of the other co-owner or co-owners does not pass the whole of the property or title to the innocent buyer. The purchaser gets only the title of the co-owner and becomes a co-owner with the rest of the co-owners. In India, on the other hand, under the express provision of the Sale of Goods Act, the purchaser of goods from a co-owner who is **in possession of the same with the consent of the other co-owner or co-owners**, gets a good title **over the whole of the goods as the sole owner thereof, if he bought them in good faith and without any knowledge or suspicion that the seller was only a co-owner** who had sold him the goods without the consent of the other co-owner/s. It is essential, however, that the selling co-owner should have had the possession of the goods **with the consent of the other co-owner or co-owners**.

A and B are co-owners of a lantern projector with several slides. By turns they use the projector. While the projector is with A, of course with the consent of B, A wrongfully, *i.e.*, without B's consent or authority, sells it away to a bona fide purchaser for value. The buyer gets a good title to the whole of the goods, because A was in possession under an arrangement with B. If one person allows goods to remain with a co-owner, **he takes the risks of such trust, and if the trust is betrayed he must suffer. The innocent buyer must be protected.** But where a co-owner does not himself leave, or allow to be left, the goods with the other co-owner, but the latter **wrongfully takes possession of the goods**, any sale to even a bona fide purchaser for value is not valid.

A and B are co-owners of a radiogram. While the apparatus is in possession of B, A secretly takes it away, and sells it to X, a bona fide purchaser for value. X cannot get a good title to the radiogram, because though A was a co-owner, A was **not in possession of the instrument with the consent of the other co-owner B**.



### **Sale by person who obtained goods under voidable contract**

A person has obtained goods from another under a voidable contract, *e.g.*, by misrepresentation which did not vitiate consent altogether—in which there was consent—or by undue influence or coercion, the consent not being free consent, the aggrieved party having the right to avoid the agreement. He then (before the aggrieved party can avoid the agreement) sells the goods to an innocent buyer in good faith for value. The buyer gets a good title, and the aggrieved party cannot claim back the goods from the buyer. (*Lowther v. Harris*, 1927, 1 K. B. 393). But if the case is one as comes under *Cundy v. Lindsay & Co.*, (1878, 3 App. Cas. 459), the innocent buyer cannot get a good title to the goods, because there was **not even a voidable contract under which the fraudulent seller had obtained the goods**, the fraud being of such a type **as vitiated consent** altogether. Thus where one Blenkarn, taking advantage of the similarity of his name with that of Blenkiron & Co., a respectable firm which was the habitual customer of one Lindsay & Co., ordered goods of Lindsay & Co., so signing his name as to make Lindsay & Co. believe that the order was from their usual customer—Blenkiron & Co.—and Lindsay & Co., having been actually deceived by this knavish device of Blenkarn, did supply the goods which Blenkarn by another cunning plan managed to get possession of, and afterwards which he fraudulently sold away to an innocent buyer Mr. Cundy, it was held that even Mr. Cundy got no title to the goods, and was bound to return them or pay for them to Lindsay & Co., because Mr. Cundy had not bought goods obtained under a voidable contract but under an absolutely void transaction there never having been any consent on the part of Lindsay & Co., to sell the goods to Blenkarn. Blenkarn they never knew; Blenkarn's face Lindsay & Co. never had seen. There was no agreement whatever between Lindsay & Co. and Blenkarn who was like a thief, and therefore Mr. Cundy could not be held entitled to the relief under the exception.

### **Sale by seller or buyer after sale**

A sold twenty bags of country flour to X. X delayed in taking the bags away. In the meantime A sold those bags away again to another purchaser who acted in good faith and for value. The second purchaser gets a good title, because X ought not to have left the goods to so remain with A. Similarly where a buyer who has not paid the price sells the goods away to another person, the second buyer would get a good title. But a person who has neither bought the goods, nor has agreed to buy the goods, cannot give a good title; so a person who had only an option to buy the goods cannot give a good title to even a bona fide purchaser for value. *Belsize Motor Co. v. Cox*, 1914, 1 K. B. 244.

### Sale in Market overt

In England, a sale in market overt (open market, *i.e.*, a recognised market where goods of the type concerned are bought and sold), at a reasonable working hour—and not under any suspicious circumstance—gives the buyer a good title if he bought without knowledge of the facts and paid a reasonable price for the same. [The buyer must not have bought on a Sunday.]

In India, we have not got this exception in our Sale of Goods Act.

### Rules relating to delivery of goods [Secs. 31-44]

The term “delivery” has been defined in the introductory part dealing with definitions and explanations. Delivery of goods sold can be made by such act as the parties agree to regard as a delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to receive them on behalf of the buyer. [Sec. 33] The rules relating to delivery may be stated as follows :—

- (1) Unless there is a contract expressly to the contrary, it is not the duty of the seller to deliver the goods to the buyer until the buyer applies for such delivery. The seller may so place the goods that the buyer could take them away. (*Mulji v. Nathubhai*, 15 Bom. 1; *Ganesh v. Nath*, 9 Lah. 148.) [Sec. 35]
- (2) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question dependant on the contract between the parties. In the absence of such contract, the goods sold are to be delivered at the place at which they are at the time of the sale; and goods agreed to be sold are to be delivered at the place at which they were at the time of the agreement to sell or, if they are still to be manufactured, at the place they would be when manufactured. If the seller is, under the contract, required to send the goods to the buyer's place, he should deliver them there to a person who apparently can take delivery of the same. The seller must, however, take care that the goods are not handed over to a person who has no authority to receive delivery of the goods. If the seller takes reasonable care to do so, he is protected; and if the goods are taken away, by fraud, by a person appearing quite respectable, who has got himself at the buyer's place, and who signs for their receipt, and then misappropriates them, the buyer has got to bear the loss. The seller is not responsible, in the absence of negligence; nor is the carrier. (*Galbraith & Grant Ltd. v. Block*, 1922, 2 K. B. 155.) [Sec. 36]

- (3) When under a contract of sale the seller is required to send the goods to the buyer, and no time for sending them is fixed, the seller must send them within a reasonable time ; as to what is a reasonable time is a question of fact depending upon the circumstances of each particular case. [Sec. 36 (2)]
- (4) Demand or tender of delivery is not effectual unless made at reasonable hour of the day. What is a reasonable hour depends upon the custom of the locality concerned, looking to the nature of the business. [Sec. 36 (4)]
- (5) When at the time of the sale the goods are with a third party, there is no delivery by the seller to the buyer unless and until such third party acknowledges to the buyer that he holds the goods on the buyer's behalf ; but where goods have been sold by the issue or transfer of any document of title to goods, *e.g.*, by a Railway Receipt, or a Bill of Lading, such third party's consent is not required. [Sec. 36 (3)]
- (6) Unless otherwise agreed by a contract, the seller has to bear expenses of, and incidental to, putting the goods into a deliverable state. [Sec. 36 (5)]
- (7) Delivery of a portion of the goods, in progress of the delivery of the whole, *i.e.*, with the intention that the delivery of the portion is a first step towards the delivery of the whole, is to be regarded in law as the delivery of the whole of the goods, so that the property in the whole of the goods passes to the buyer. But when a portion of the goods has been delivered, and the intention is merely to separate them from the rest and to deliver that portion only, the delivery of that portion is not deemed to be the delivery of the whole. A ship arrives with a cargo in favour of X who is the buyer. A portion of the cargo is discharged from the ship and delivered to X with the intention that the rest of the goods would also be delivered. The delivery of the portion of the goods to X is equivalent here to the delivery of the whole of the cargo ; and the property in the whole of the goods passes to the buyer. (See *Dixon v. Yates*, 5 B. & Ad. 313.) (Also *Reid Co. v. Buldeo*, 1888, 15 Cal. 1.). [Sec. 34]

When a delivery of a part of the goods has been done with the intention of delivering the rest also the property in the whole of the goods is deemed to pass to the buyer as soon as the portion is delivered. (*Kemp v. Falk*, 1882, 7 App. Cas. 573.)

- (8) When the seller delivers to the buyer the wrong quantity of goods, *i.e.*, quantity more or less than that contracted for, the buyer may reject the goods delivered, provided the amount is not quite a negligible amount. The law does not take notice or account of trifling things ; so if the delivery of the goods is only slightly more or slightly less than the contracted quantity, so that a reasonable man would not reject such delivery the buyer would not be entitled to refuse to take delivery, unless the goods are very precious articles like platinum, gold, diamond. (*Jackson v. Rotax Motor & Cycle Co.*, 1910, 2 K. B. 937.) When the buyer accepts the wrong quantity the buyer shall be bound to pay for the same proportionately at the contract rate. (*Payne & Routh v. Lillico*, 36 T. L. R. 569.) [Sec. 37]
- (9) If the seller delivers to the buyer the goods he contracted to sell mixed up with goods of different description not mentioned in the contract, it is open to the buyer to reject the whole, or to accept the whole, or to accept the goods which are in accordance with the contract and reject the rest. (*Nicholson v. Bradfield Union* 1866, 1 Q. B. 620.) [Sec. 37 (3)]

Where 200-yard reels of sewing cotton were sold, under a contract which provided that unless within fourteen days from the receipt of the goods the buyers objected to the same, the goods would be deemed in all respects according to the contract, and where it was actually a year and a half after the delivery that the buyers found the goods to be short in quantity, it was held that the suit could successfully lie against the sellers **because the defect was not of quality but was as to the quantity**. If the defect had been in respect of quality, the buyers could not have sued the sellers fourteen days after the receipt of the goods. The buyers were, therefore, awarded damages. (*Beck & Co. v. Szymanoski & Co.*, 1924 A. C. 43.) [Sec. 38 (1)]

- (10) Unless otherwise agreed by contract, the buyer is not bound to accept delivery of goods by instalments. Where a person agreed to sell and deliver two ships, but before their delivery to the buyer, one of these ships was requisitioned by the Government, it was held that the buyer could reject the one ship delivered to him, because the contract was for delivery of both the ships. (*Claddagh St. Co. v. Stevens Co.*, 1919, 11 H. L. S. C. 132.) [Sec. 38 (1)]

- (11) When there is a contract that goods shall be delivered by stated instalments and that the instalments shall be separately paid for, and the seller does not make delivery or makes defective delivery, in respect of one instalment or more, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it becomes a question of fact depending on the terms of the contract and the circumstances of the case, whether the breach of contract entitles the aggrieved party to repudiate the whole of the contract or to sue for damages only. [Sec. 38 (2)]
- (12) Delivery of goods by the seller to a carrier for transmission to buyer or to wharfinger for safe custody is prima facie deemed to be a delivery of the goods to the buyer unless the *jus disponendi* has been reserved by the seller. (1803, 3 B. & P. 582.) Unless otherwise allowed or authorised by the buyer, it is the duty of the seller to make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and all other circumstances. If the seller omits to do so, and if the goods are lost or damaged in the course of transit or while in the custody of wharfinger, the buyer may refuse to take the delivery to the carrier or the wharfinger as a delivery to himself, and may hold the seller liable for damages. Unless otherwise agreed by a contract, when the goods are sent by the seller to the buyer by a sea route, and it is usual to insure the goods, it is the duty of the seller to inform the buyer that the goods are usually insured and that the buyer may insure them during the transit, unless the goods are sent c.i.f. or ex ship ; if the seller fails to give such notice, the goods shall be at the risk of the seller during the course of the transit, unless the buyer was actually aware that it was usual to insure. If, however, the seller does give notice to the buyer and the buyer does not wish to insure them then the goods will be at the risk of the buyer. [Sec. 39].

Where goods were sold f.o.b., to be shipped as required by the buyers, and the buyers then asked the sellers to ship the goods to Odessa and to pay freight on their account, and the goods were shipped but got lost, the buyers declined payment on the ground that the sellers had not given the buyers notice regarding the custom of insurance. The Court held that though notice had technically to be given by the seller to the

buyer, yet, in this case because the buyers were actually aware that insurance of the goods should be effected and still did not elect to insure them the buyers must suffer. (*Wimble v. Rosenberg*, 1913, 3 K. B. 743.)

- (13) Unless otherwise agreed by contract, when goods are delivered to a buyer on the sale or return basis and he refuses to accept them, he is not bound to return them to the seller, but it is his duty to intimate to the seller that he has refused to accept them ; otherwise, after lapse of a reasonable time he will be deemed to have accepted the goods. (*Buck Co. v. Govardhandas*, 24 Bom. L. R. 991.) [Sec. 43]
- (14) If the seller is ready and willing to deliver the goods to the buyer and requests the buyer to take delivery of the same, and the buyer does not within a reasonable time after such request take delivery of the goods, the buyer would be liable to the seller for any loss or damage caused by his negligence or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods, unless the negligence or the refusal of the buyer to take delivery is really a repudiation of the contract. [Sec. 44]

### MEANING OF UNPAID VENDOR

#### Rights of unpaid vendor of goods [Sec. 45]

An unpaid vendor (seller) of goods is a person who has sold goods to another and has not been paid the whole of the price. The Indian Sale of Goods Act provides that—

The seller of goods is deemed to be an “unpaid seller” if—

- (a) the whole of the price has not been paid or tendered, or
- (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

The term “seller” includes any person who is in the position of a seller, as for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for the price. (*Chimanlal v. Pehladrai & Co.*, 31 Bom. L. R. 508.)

The rights of an unpaid seller of goods are as follows :—

- (1) **The right of lien on the goods for the price, as long as the goods are in possession of the seller.**
- (2) **The right of stopping the goods while they are in transit after the seller has parted with the possession of them, provided the buyer has become insolvent, i.e., unable to pay his debts as they fall due in the ordinary course of the business. This is known as the right of stoppage in transit.**
- (3) **The right of resale of the goods after stopping them in transit and taking them back.**
- (4) **The right to sue for the price or for damages.**

[Sec. 46]

### (1) **The Right of Lien [Sec. 47]**

The unpaid seller of goods, who is in possession of them, can detain the goods until payment or tender of the whole of the price, provided the goods have been sold without any stipulation as to credit, or, if with any stipulation as to credit, the period of credit has expired, or even though the period of credit has not expired the buyer has become insolvent, i.e., unable to pay his debts.

Lien can be exercised for non-payment of the whole of the price; but no lien can be claimed for anything in excess of the price. For, example, the seller cannot claim warehouse rent which he had to pay in the exercise of the lien. (British Empire Shipping Co.'s case 30 L. J. Q. B. 229.)

The lien of an unpaid vendor of goods is **possessory lien, i.e.,** a lien which depends upon the fact of possession, and is lost with the loss of possession. If the buyer has become insolvent, then the seller need not wait till the period of credit, if any, expires; the seller can exercise his lien immediately.

When an unpaid seller had made a part delivery of the goods, he can exercise his right of lien on the rest of the goods unless the delivery of the part was in progress of the whole, i.e., the part delivery was a first step towards the delivery intended to be of the whole of the goods. But where the part delivery is not in progress of the whole, the seller can exercise his right of lien over the rest of the goods. (Ex parte Chalmier, 1873, 8 Ch. App. 289.) Also Ex parte Cooper, 1879, 11 Ch. D. 68; Wintworth's case, 1842, 10 M. & W. 436

An unpaid seller loses his lien on the goods (1) when he delivers the goods to a carrier or other bailee for transmission to the buyer **without reserving the right of disposal** of the goods; or (2) the buyer

or his agent **lawfully obtains the possession** of the goods ; or (3) the seller **abandons** the lien. The unpaid seller does not lose his lien by reason only that he has obtained a decree for the price of the goods. (*Houlditch v. Desanges*, 1818, 2 Stark 337.) [Sec. 49]

## (2) Stoppage in Transit [Secs. 50—52]

When the right of lien has lapsed because possession has been parted with, the unpaid vendor of goods gets another valuable right, *viz.*, the right of stoppage in transit, *i.e.*, stopping the goods in transit. This right can only be exercised **when the buyer has become insolvent**, *i.e.*, unable to pay his debts in the ordinary course of his business or as they become due. If the buyer has become insolvent, *i.e.*, unable to pay his debts, the seller can exercise the right of stoppage in transit **as long as the goods are in transit**, but not thereafter. If the transit is at an end, the right of stoppage in transit is lost. Goods are said to be in transit as long as the buyer or the buyer's agent or servant has not received possession of the same. Once the goods reach the hands of the buyer or his agent or servant, the transit is at an end. If the buyer or his agent or servant obtains delivery of the goods before they reach their destination the transit is at an end. If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he (the carrier or the other bailee) holds the goods on behalf of the buyer or the buyer's agent, the transit is at an end, and it is immaterial that a further destination of the goods was indicated by the contract. If the goods are rejected by the buyer and the carrier or the other bailee continues to hold them, the transit is not deemed to be at an end, even if the seller has refused to receive them back. [Sec. 50]

B, at Delhi, orders goods of A at Calcutta. A consigns and forwards the goods to B. On arrival at Delhi, they are taken to B's warehouse and kept there. B refuses to take these goods and stops payment. The goods are in transit, and the unpaid vendor can take them back. (*James v. Griffin*, 1837, 2 M. & W. 623.) When goods are delivered to a ship chartered by a buyer it becomes a question depending on the circumstance of the particular case whether they are in the possession of the master as a carrier or as an agent of the buyer ; that is a question of fact. If the ship is chartered by the buyer or one belonging to the buyer, the transit comes to be at an end as soon as the goods are loaded on the ship, unless the seller had reserved the *jus disponendi*, *i.e.*, the right of disposal of the goods. (*Schotsmans v. L. & V. Rly.*, 1867, 2 Ch. 332). See *Cowasji v. Thompson*, 3 M. I. A. 422. Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent, the transit is deemed to be at an end. When part delivery of the goods has been made to the buyer or his agent, the rest of the goods may be stopped in transit by the unpaid seller, unless the part delivery was in progress of the whole, *i.e.*, was made with the intention



of delivering the rest of the goods also. If the part of the goods delivered were delivered with the intention that the rest of the goods would also be delivered, the right to stop the rest of the goods is lost. [Sec. 51]

Where goods are agreed to be delivered at a particular place but the buyer then asks the seller to deliver them at a different place the transit continues till the goods are taken by the buyer or his agent at that place. (*Bapuji v. The Clan Line Ltd.*, 34 Bom. 640.) [Sec. 51]

The unpaid seller can exercise his right of stopping the goods in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given to the owner of the ship also ; if it is given to the shipowner (instead of to the carrier or other bailee in possession of the goods), the notice must be so given that the principal could in turn, by the exercise of reasonable diligence, communicate it to his servant or agent in time to prevent a delivery of the goods to the buyer. (*Kemp v. Falk*, 1882, 7 App. Cas. 573.) When the seller has given such notice of stoppage in transit to the carrier or other bailee who possesses the goods, such carrier or bailee must re-deliver the goods to, or according to the directions of, the seller. The expenditure incurred in such re-delivery must be borne by the seller. [Sec. 52]

The unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has agreed to the same ; provided, however, that where the documents of title to the goods have been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the same in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated (*Dreyfus Co.'s Case*, 1943 K. B. 40), and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

Where the transfer is by way of pledge, the unpaid seller may call upon the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer. [Sec. 53 (2)]

### **Contract of Sale not rescinded by mere exercise of lien or stoppage in transit**

A contract of sale is not rescinded by the mere exercise of the right of lien or stoppage in transit. [Sec. 53 (1)]

### 3. The Right of Re-Sale

When the goods which have been obtained back by the seller are of a perishable nature (*i.e.* perishable physically or in the economic sense), or where the unpaid seller who has exercised his right of lien or stoppage in transit has given notice to the buyer of his intention to resell the goods if the price or the balance of the price, as may be, is not paid up by the buyer, the unpaid seller may resell the goods within a reasonable time and recover from the original buyer damages for any loss caused to him by the re-sale ; but if any profit accrues from the re-sale, such profit shall go to the unpaid vendor and not to the buyer. If the seller resells the goods without giving notice to the buyer of his intention to resell and asking him to pay up the price, he shall not, **unless the goods are of a perishable nature**, be entitled to recover damages from the buyer for any loss occasioned on the re-sale ; nor shall he be entitled to pocket any profits which may accrue on the re-sale, and the same shall go to the buyer. [Sec. 54]

When an unpaid seller has sold the goods which he got back or with regard to which he exercised lien, the person buying from him gets a good title to the goods as against the original buyer, in spite of the fact that no notice of the re-sale was given to the original buyer.

#### **Unpaid Vendor's Notice to Buyer of his Intention to resell the Goods if the unpaid Price is not paid up**

Address (of the seller)

Date,

To

.....(name of buyer  
and his address)

Dear Sir/Gentlemen,

I/We do hereby give you notice that I/We are desirous of re-selling the goods the price of which yet remains to be paid by you to me/us, and that I/we shall exercise that right of mine/ours as unpaid vendor/s, if the price/the balance of the price is not paid up to us by the.....day of.....19 , and that if I/We realize on the re-sale any lesser amount than that due payable by you towards the price, I/We shall recover the same from you.

Signature of the seller/s.

**Original Contract of Sale rescinded by the Seller reselling the goods under power given by the express reservation of Right of Re-sale**

Where the seller expressly reserves a right of re-sale in case the buyer makes default, and, on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages. (Lamond v. Davall, 1847, 9 Q. B. 930.) [Sec. 54 (4)]

**4. Suit for price or damages**

Where under a contract of sale the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay the price, the seller can sue the buyer for the price of the goods.

Where under a contract of sale the price is payable on a day fixed irrespective of the delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may sue the buyer for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

When the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

Where the property in the goods has not passed to the buyer, and the price was not payable without passage of property, the seller cannot sue for the price but can sue for damages.

Even if the seller has exercised the right of re-sale (as allowed him by the original contract of sale) he can sue for damages for any damage suffered by him by reason of the buyer's default. (Narain v. Volkart Bros., A.I.R., 1946 Lah. 116.)

**Rules Relating to Sale by Auction**

The following are the rules that apply to sales by auction :—

- (1) When goods are put up for sale in lots, each lot is deemed, *prima facie*, to be the subject of a separate contract of sale.
- (2) At an auction, the sale is complete and the bid is accepted when the auctioneer announces the completion in the usual or customary manner, *e.g.*, by the fall of the hammer ; until such completion the bidder is entitled to withdraw his offer. [It is also the practice to say "three times." (Agra Bank's case, 14 Mad. 235; Mackenzie v. Chumin, 16 Cal. 702.)]

- (3) A right to bid may be **reserved expressly** by or on behalf of the seller, and when such right is expressly so reserved, but not otherwise, the seller or any person on his behalf may bid at the auction. When the sale at auction is not notified to be subject to the right of the seller to bid, it shall not be lawful for the seller or his agent to bid himself at such sale, or for the auctioneer to take or accept any bid from the seller or the agent of the seller ; and any sale which contravenes this rule can be treated as fraudulent by the buyer, and the buyer will be entitled to withdraw from the contract, for like any other contract under the Contract Act it would be avoidable at the option of the bidder, on the ground of fraud. (*Thornett v. Haines*, 1846, 15 M. & W. 367.)
- (4) The sale by an auction may be notified to be subject to a **reserved or upset price**.
- (5) If the seller himself pretends to raise the price, the sale is voidable at the option of the bidder or the buyer.

#### **Sale of Goods Act is neither retrospective nor exhaustive**

The Act does not apply to transactions which took place before the day on which it came into force.

Other Laws and Acts not inconsistent with the Sale of Goods Act shall apply *mutatis mutandis*, i.e., subject to qualifications and modifications.

#### **Customs and conventions override the provisions of the Act, and what is expressed may put an end to what is tacit or implied**

Custom has been the origin of the Mercantile Law, and even to-day what is in the Law is made subject to definite, reasonable and well-established customs and usages of trade. Customs and usages differ in different localities. What may be a custom in the Punjab may not be applicable in Bombay or Bengal. *Modus et conventio vincunt legem* (modes and convention conquer or set aside the legal provisions).

What is tacit in law, e.g. the implied conditions and warranties, may be overthrown by express provisions in the Contract. *Expressum facit cessare tacitum*. (*Hone v. Muller*, 1894, 7 Q. B. D. 103.)

#### **Bills of Sale**

A bill of sale is a document recognizing transfer of property in the goods from one person to another but allowing the possession to remain with the transferor. (*Ramsay v. Margrett*, 1894, 2 Q. B. D. 18.)

The following documents are considered as bills of sale :—

Bills of sale, transfers, assignments, declarations of trust without transfer, receipts for purchase-moneys of goods, inventories of goods with receipts attached, assurances of personal chattels, agreements by which an equitable right or benefit to any personal property is to be conferred.

The following documents are not bills of sales :—

Assignments for benefit creditors of the assignor; transfer or assignment of any ship or part thereof; bills of sale of goods in foreign places; bills of lading, India warrants, warehouse keeper's certificate, warrants for delivery of goods; documents of title, marriage settlements.

### **Personal Chattels**

Personal chattels are things such as furniture and other articles capable of being transferred by delivery, without the necessity of any instrument of assignment. Fixtures and growing crops are included when separately assigned, but not choses in action. Government loans, securities, shares in companies, are not personal chattels.

## CHAPTER XIX

### REMEDIES FOR BREACH OF CONTRACT

[Secs. 73—75 of the Contract Act]

When a breach of contract is committed, the aggrieved party can sue for (1) **damages** for any damage suffered by him, or (2) **specific performance** of the contract, or (3) can apply to the court for an **injunction**, or (4) sue for **rescission** of the contract. He can also resist the other side's claim against him for specific performance or damages and can **avoid the further performance of the agreement**.

**Damages** are the pecuniary compensation allowed by a Court of law to the aggrieved party for the loss or injury suffered by him. The loss or injury suffered is known as **damage**. This is the difference between "damage" and "damages".

Damages are (1) **Contemptuous**, (2) **Nominal**, (3) **Compensatory** and (4) **Exemplary** or **Punitive**.

When the party aggrieved has suffered only **nominal damage**, or his **right** has only been **technically injured**, he can recover only **nominal damages** and the costs of the suit.

Damages are said to be **contemptuous**, *i.e.*, of an extremely petty amount, *e.g.* a penny—an anna—when the Court finds that a breach has been committed, but that breach is so **insignificant** or petty that a reasonable man would not have gone to Court for a redress. **The law does not take account of trifling things**; and, where it does, it awards also something of a contemptuous character, for the Court highly disapproves the childish rush by the plaintiff to the Court for redress for a wrong which is really petty and negligible.

If the aggrieved party has suffered **substantial damage** then he will recover a sufficient sum of money as damages to compensate him for the loss suffered. That is **compensatory damages**.

When a party to a contract has, because of its breach, suffered damage which affects him or his reputation, he can recover **damages, which, the Court will see, are in the nature of a punishment so as to set an example unto others**. In the case of wrongs like defamation, assault, battery, mayhem, trespass, it is open to the Court, if the injury is rendered maliciously or deliberately, to allow the aggrieved party damages not merely as solatium for damage suffered, but also something which would punish the wrongdoer. In the case, however, of contracts, **exemplary damages** are allowed only when there is a breach of promise of marriage. For the loss of a prospective home and for mental injury suffered or caused by reason of breach

of the promise of marriage, the aggrieved lady will be entitled to recover from the person who broke the promise of marriage, substantial sum as damages, and not only that but the Court may, if it thinks fit, allow her **exemplary** damages, *i.e.*, something far more than substantial compensation.

In a breach of contract, the aggrieved party is entitled to recover from the other party compensation for loss or injury or damage caused to him thereby, provided such loss or damage arose **naturally and directly** in the **usual** course of things from such breach or which the parties to the contract **knew**, at the time they entered into the contract, **to be likely to result** from the breach of the contract. This is the rule in *Hadley v. Baxendale*, 4 H. & C. 247) In *jure non remota causa, sed proxima spectatur*, *i.e.*, in law, not the remote cause, but the proximate (cause) is taken notice of. (*Hadley v. Baxendale*, 4 H. & C. 247.) If the damage or loss suffered by reason of the breach of the contract is **remote** or **indirect** no compensation would be allowed. (*Hadley v. Baxendale*, 4 H. & C. 247 ; 9 Ex. 341.)

A contracts to repair B's house and receives payment for that in advance. A repairs the house but not as required by B. B can recover from A the cost of making the repairs conform to the contract. He can employ another contractor and recover from A the amount required to pay that other contractor. To take another example : A delivers to B who is a common carrier a machine to be conveyed without delay to A's mill, informing B that the mill had stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A can recover from B as compensation or damages the average amount of profits which would have been earned by the working of the mill during the time the delivery of the machine was delayed, but he cannot recover damages for the loss sustained by him through the loss of the Government contract, because such loss was **not the direct and the natural result** of the delay ; and besides it was **not in contemplation of the parties to the contract when they entered into the contract**. Such damage, being too remote, cannot be recovered. Such damage is known as a **special** damage not flowing directly from the cause complained of, and so **special damages** cannot be recovered for such special damage. But where the other party has been told **beforehand that there is going to be a special advantage or a special contract and that delay would cause a loss of such special advantage or contract**, the party causing the delay can be held liable as the damage was within the contemplation of the parties. Otherwise, *i.e.* in the absence of such contemplation or knowledge imparted beforehand, the other party is not liable to special damages, but only to **general** damages, *i.e.*, damages for such damage only as flows **directly and naturally** from the cause complained of. (See *Madras Railway Co. v. Govinda*, 21 Mad. 172 ; *Ramgopal v. Dhanji*, 1928, 55 Cal. 1048.)

In considering the question of the cause of the damage, we have to consider the **near cause and not the remote cause**. Thus, where rats entered a ship's hold and gnawed holes in the lead pipe of the bath-room on board a ship and sea water entered the hold and caused damage to the goods, it was held that the insurer was liable, because the loss was caused by the ordinary sea-peril. It was argued on behalf of the insurance company that had it not been for the mischief done by the rats in boring the holes, the mere fact of the sea-water having entered, would not have caused the damage. But the Court held that the law being concerned not with the remote cause (the rats), **but the proximate cause** (the sea-water), gave judgement in favour of the cargo-owner. (See *Hamilton v. Pandorf*, 1887, VI, Asp. M. L. C. 212).

### Interest as damages

Interest is allowed, from the date of default till the date of actual payment, as damages when (1) there is an agreement to pay interest or (2) there is a custom or usage to that effect, or (3) under the provisions of the Interest Act. (*B. N. Rly. v. Rustomji*, 1937, 65 I. A. 66.)

### Liquidated Damages and Penalty [Sec. 74]

Parties to a contract may, **at the time they enter into the contract stipulate that in the case of breach of contract**, the party committing the breach shall pay the other party **a fixed sum of money**; such payment may be enforced by the Court.

When there is a breach of contract, the amount to be paid, in case of such breach, is payable to the other party even though actual damage or loss is not proved to have been caused by the breach, if the sum appears to the Court to be **reasonable, but not otherwise**; otherwise the court can allow the aggrieved party a reasonable compensation **not exceeding the amount fixed beforehand by the parties**. (*Nait v. Dat*, 1883, 5 All. 238.) A stipulation that increased interest will be payable from the date of default in the case of payment of a debt may be regarded as a stipulation by way of penalty, *i.e.* in *terrorem* on the other party, and not as a just compensation to the aggrieved party.

Under English law distinction is made between what is known as **'liquidated damages'** and what is known as **'penalty'**. If the amount fixed beforehand by the parties is a reasonable amount meant for the just protection of the aggrieved party, it is regarded as a valid amount of liquidated damages; but if the sum payable is unfairly high and in *terrorem* (*i.e.*, by penalty) on the other party, it is known as a penalty and would not be allowed by the law Court. In the case of a penalty, the plaintiff would be entitled only to such damages as he can prove as he has already suffered, as if there had



been no agreement whatsoever as to the amount fixed beforehand. But where the sum fixed beforehand is a reasonable protection of the aggrieved party, and is in the nature, therefore, of liquidated damages, the Court cannot give anything more or less than such **agreed** amount.

In India no distinction is observed as between liquidated damages and penalty. The term 'penalty' may be used in the same sense as the terms 'liquidated damages'. In India, it is for the Court to determine the actual amount of damage suffered by the aggrieved party and to allow the sum, provided, however, that the amount allowed by the Court does not exceed the amount fixed by the contract.

A stipulation that increased interest will be paid from the date of the default may be regarded as in *terrorem* of the other party. (See also *Sankaranarayana v. Sankaranarayana*, 25 Mad. 343.) A gives B a bond for the repayment of Rs. 1,000, with interest at  $12\frac{1}{2}\%$  per annum at the end of six months, with a stipulation that if default is made, interest shall be payable at  $75\%$  per annum from the date of the default. This is a stipulation by way of penalty, and B can only recover from A such compensation as the Court would deem reasonable. (*Banna Singh v. Arjan Singh*, 57 Mad. L. J. 323—P.C.) A borrows Rs. 100 from B, and gives B a bond for Rs. 200, payable by 5 yearly instalments of Rs. 40 each, with a stipulation that, if default is made in payment of any one of the instalments, the whole sum shall become due at once. This is also a stipulation by way of penalty. (*Kelchand v. Flagg*, 36 Bom. 164; see also 47 Mad. L. J. 833.)

When there is a stipulation that increased interest will be paid not merely from the date of default **but right from the date the bond was executed**, the Court will **always consider such stipulation to be a penalty**. (See *Kalachand v. Shib*, 1892, 19 Cal. 392; *Sajaji v. Maruti*, 14 Bom. 274; *Nanjappa v. Nanjappa*, 12 Mad. 161. *Sunder v. Krishen*, 1907, 34 Cal. 150; *Trimbak v. Bhaghand*, 1902, 4 Bom. L. R. 713.)

It is competent to the Court to allow compound interest at the same rate as simple interest from the date of default when the parties have so agreed beforehand; but a stipulation to pay compound interest at an **increased** rate if default is made, is to be considered by the Court as a penalty, even though the increased rate is merely to be paid from the date of the default and not from the date of the bond. (*Sunder Koer v. Rai Sham Krishen*, 1907, 34 Cal. 150; see also *Rao v. Subbayya*, 38, Bom. L. R. 1229.)

### **Duty of aggrieved party to minimise damage or loss**

The party aggrieved by the breach of contract must not aggravate the damage; nor should he sit lethargically. He should do

all he can to minimise the loss. Thus if goods were not delivered to him, he can buy the goods elsewhere at a fair or reasonable price, and then sue the defaulter for the difference between the price at which he bought the goods from the other seller and the original contract price at which the defaulting seller had agreed to sell him the goods if that be a lesser price. Thus if the contract price was Rs. 100, and the buyer had to pay to the other seller Rs. 150, the damages he can claim from the defaulting seller would be Rs. 50—the difference. This is the measure of **compensatory** or **substantial** damages. But the buyer cannot buy at a **reckless** price, if at the date of the breach the prices (in the contract commodity) have risen very heavily in the market. In such a case, he must wait at least for a reasonable time to see the prices settle down more or less to the normal.

If the aggrieved party, by reason of a re-contract, gets a benefit, the benefit goes to him; the original defaulter—the defendant—cannot claim it or any part of it. (See *Jamal v. Moola Dawood & Sons*, 43 I. A. 6.) (See also *Ballu v. Kishen*, 43 All. 263.)

If, in trying to minimise the loss or damage, the aggrieved party incurred any expenditure, he can recover that also from the party committing the breach, provided such expenditure was justifiably incurred; but not so if it was incurred improperly, unreasonably or unnecessarily. (*Blanche v. L. & N. W. Rly*, 1876, 1, C. P. D. 286). Thus a passenger who had, because of an accident, to be left by a Railway Company short of his destination and had to alight and go his way home, he is entitled to sue the Railway Company for the inconvenience of having to walk; and if he chose to stay at an inn he could recover the expenditure for such stay. (*Hamlin v. G. N. Rly. Co.*, 1 H. & N. 408) But if he preferred to walk all the way home (though there were inns adjoining) in wintry or windy weather, and if, as the result of this *actus novus interveniens* i.e., the new intervening act—of the cold weather—he contracted influenza, he cannot sue the Rly. Company for all the hospital bills or medical charges, because by having unnecessarily walked all the way home, he had brought in damage to his health—a damage which was not the natural or direct consequence of the act of the Rly. Company having alighted the passengers short of their destination.

### Specific Performance

As a rule where damages are an **adequate** remedy, specific performance is **not allowed**. **Specific performance means** the actual performance of the promise under the contract. If A has promised to deliver goods to B at a mentioned date, and if at that date he fails to deliver the goods, B can buy those goods elsewhere; and if

by such purchase elsewhere he has to pay more, he can recover such damage, as damages from A. But B cannot sue A, praying that the Court may order A to deliver the very goods, because damages are a **satisfactory remedy**, and it is **not necessary** to order any specific performance. But if the goods which A had contracted to sell to B be of such type that B cannot obtain the same anywhere in the market, the Court would allow specific performance and order the party committing the breach (*i.e.*, A) to deliver those goods to B.

When damages are inadequate remedy, specific performance would be allowed. For example, A has agreed to sell a rare painting to B, but now refuses to deliver it to him. B can sue for specific performance, because damages would not satisfy him. The picture could not be obtained elsewhere in the market, being a rare painting by some master painter, and B, who has a fancy for it, wants it.

Contracts involving **personal skill**, element of **labour** or **volition**, cannot be specifically performed, because to compel a man to do anything against his wish or to force him to work would be ridiculous and useless. For example, if a painter be **compelled** by the Court to specifically perform his promise *i.e.*, paint the picture, he would make (in the portrait) the promisee look like a veritable ostrich—may make him look amply ridiculous.

### Injunction

An aggrieved party can sue for an injunction, *i.e.*, an order of the Court restraining the wrongdoer from doing, or continuing, the wrongful act complained of.

Under the Specific Relief Act, an employer can obtain an injunction, from a Court of law, restraining his employee (who had agreed to serve with the employer, for a stipulated period of time from working anywhere else in the same trade or business or work, **during the agreed period of time**. A agreed to work at a Chemist's shop for a period of 5 years. Having worked there for 2 years, he committed breach of contract, and took up employment with a **rival chemist**, though he had expressly contracted not to work with any) rival during the period of 5 years of the contract. The employer cannot bring a suit praying that A should be compelled to work with him, but he can sue for an injunction that A may be ordered to abstain from working with the rival chemist or with any other rival chemist during the remaining three years of the contract. Thus **negative covenants**, *i.e.*, stipulations to abstain from something, can be enforced by injunctions in fit and proper cases.

**SPECIMEN PLAINTS**

(In a suit for damages)

In the.....(state name of the Court)

A. B. of Bombay, a Hindu Inhabitant, residing at Colaba, within the Fort of Bombay, and doing business as a merchant dealing in hardware.. Plaintiff.

Vs.

P. Q. of Bombay, a Hindu Inhabitant, residing at Byculla, outside the Fort of Bombay, and doing business as a merchant in machinery and in iron and steel goods. .. .. Defendant.

A. B. the plaintiff abovenamed states as follows :—

1. On the (date)....., the plaintiff ordered of the defendant P. Q. 100 bars of Steel (state particulars).....at Rs..... per bar, to be delivered by (state date).....

2. The defendant P. Q. has not yet delivered the said iron bars even though the time for delivery has passed. On the date of delivery of the said iron bars, the plaintiff wrote to the defendant asking the defendant to supply the said bars, but the defendant did not care to supply the said bars or any number at all of the said bars.

3. The plaintiff, under the circumstances, bought the said bars from one XY, of Bombay, a merchant dealing in hardware, and machinery, and doing business at Mazagaon, at Rs....., thereby suffering damage of Rs.....

4. The contract was made and entered into in Bombay, and the defendant works for gain in Bombay, and the plaintiff submits that this Hon'ble Court has jurisdiction to try this suit.

5. The plaintiff prays that this Hon'ble Court may be pleased to pass a decree in favour of the plaintiff for Rs.....(amount claimed as damages for the damage suffered) with interest thereon at six per cent. per annum, and for the plaintiff's costs of this suit.

Plaint drawn by :

.....

Signature of the Plaintiff.

Before me,

.....

.....

**Specimen Plaint for Price of Goods Sold**

In the.....(State name of the Court.)

A. B. of Bombay, a Hindu Inhabitant, residing at  
Girgaon Road, outside the Fort of Bombay, and  
doing business as a dealer in clothes .. .. Plaintiff.

Vs.

X. Y., a Mohmedan Inhabitant of Bombay, residing at  
Foras Road, outside the Fort of Bombay.....Defendant.

A. B. the plaintiff abovenamed states as follows :—

1. On the.....(state date) 19 , the plaintiff A. B.  
sold and delivered to defendant X. Y. 100 yards of cloth.....  
(state particulars) at Rs. 4 per yard.

2. Though the said goods were delivered as required by the  
defendant, the defendant has not yet paid the price therefor.

3. It was agreed as between the plaintiff and the defendant  
that the price shall be paid on delivery of the said goods.

4. The defendant resides at.....and the contract was  
made and entered into in.....and this Hon'ble Court has  
therefore the jurisdiction to try this suit.

5. The plaintiff prays for a decree for Rs.....together  
with interest at six per cent. per annum from the date of default  
till payment, and costs of the suit.

Signature of the Plaintiff.

**Specimen Plaint in a suit for Specific Performance**

In the.....(State name of the Court.)

A. B. of Bombay, a Parsi Inhabitant, residing at  
Marine Drive, within the Fort of Bombay .. Plaintiff.

Vs.

X. Y. a Parsi Inhabitant of Bombay, doing business,  
at Church Gate Street, within the Fort of Bombay  
as a seller in China-ware, and residing at Warden  
Road, outside the Fort of Bombay .. .. Defendant.

A. B. the plaintiff abovenamed states as follows :—

1. The plaintiff, on the.....(date) entered into a contract with the defendant whereby the defendant agreed to deliver to the plaintiff an old China Vase of a rare and valuable type for Rs. 7,000, the price to be paid immediately on delivery, and delivery to be effected within a week from the date of the contract.

2. The defendant failed to keep his promise to deliver the said vase, though the plaintiff personally saw him at his shop and asked him to deliver the said vase to him. In spite of the plaintiff's demand for the delivery of the said vase, the defendant wrongfully and without any cause or excuse refused to deliver the same, though the plaintiff was ready and willing to pay the price of Rs. 7,000 agreed to be paid, and even tendered the amount at the shop of the defendant.

3. The plaintiff therefore tried his best to procure a similar vase elsewhere, but he has not so far succeeded in procuring one of the type the defendant agreed to sell to him. The plaintiff says that the vase agreed to be sold by the defendant is a vase which is an old China article and difficult of being obtained in the market. The price of Rs. 7,000 was a fair price for the same. The plaintiff further adds that he, having a fancy for the said vase, is desirous of having it according to the contract between him and the defendant.

4. Under the circumstances abovementioned the plaintiff prays for specific performance of the said contract between him and the defendant.

5. The defendant resides in Bombay and does business in Bombay, and the contract was made and entered into in Bombay, and this Hon'ble Court has, therefore, the jurisdiction to try this suit.

6. The plaintiff prays that this Hon'ble Court would be pleased to order the defendant to deliver the said vase to the plaintiff upon the plaintiff paying the defendant the sum of Rs. 7,000 as agreed. The plaintiff prays also for the costs of this suit, and for any other relief as the Court may think fit to allow.

Signature of the Plaintiff.

### Specimen Complaint for a suit for Injunction

In the High Court of Judicature at Bombay.

A. B. of Bombay, Manager of.....	
Theatrical Co., Fort, Bombay .. .. .	Plaintiff.
Vs.	
X. Y. of Bombay, residing at Colaba, a singer	
by profession— .. .. .	Defendant.

The plaintiff abovenamed states as follows :—

1. By a contract dated.....19 , the defendant agreed with the plaintiff, to sing at his (the plaintiff's) theatre for twelve months. It was agreed that she was to be paid Rs. 300 for each night's performance. After singing at the theatre for some time, she committed breach of her contract, by refusing to continue the singing, during the agreed term, at the plaintiff's theatre. She had also given an undertaking not to sing at rival theatres, but in breach of her agreement she is now singing at rival theatres, though the twelve months during which she had agreed to sing at the plaintiff's theatre have not yet been over.

2. The plaintiff repeatedly requested the defendant not to commit breach of her agreement, and to resume singing at his theatre and to abandon, for the time being, singing at rival theatres, but to no avail.

3. The contract was entered into in Bombay, and the defendant is residing in Bombay and working for gain in Bombay. This Hon'ble Court has therefore jurisdiction to try this suit.

4. The plaintiff will rely on documents a list of which is hereto annexed.

5. Under the circumstances, the plaintiff prays that the defendant may be restrained by an order and injunction of this Hon'ble Court from carrying on the singing at rival theatres.

The plaintiff prays that the defendant may be ordered to pay the costs of the plaintiff.

Signature of the Plaintiff.

## CHAPTER XX

### INDIAN PARTNERSHIP LAW

#### [INDIAN PARTNERSHIP ACT, 1932]

##### Indian Law of Partnership uniform with the English Law

The law relating to partnership in India, as contained in the Indian Partnership Act, is uniform with the law prevailing in England, except on certain points, such as that of registration of firms. In order that inconvenience may not be caused to traders and persons in business, the legislature thought it fit to follow, as far as possible and practicable, the English law of Partnership.

##### Indian Contract Act & Partnership Law

The Indian Contract Act, which formerly contained the provisions of the law of partnership, even to-day applies *mutatis mutandis* to firms. Where the partnership Act is silent on any point, the general principles of the Indian Contract Act apply to contracts of partnership also—as provided by the Indian Partnership Act itself.

##### Main steps of progress taken by the Partnership Act

The most important step in the direction of progress taken by the Indian Partnership Act is that of registration of firms, thus mitigating the scope of fraud by partners against those of their own fold—by enabling the proof of partnership by the fact of registration.

The Act has attempted the elaboration and clarification of the existing principles which are now more systematically arranged.

##### The Act is neither retrospective nor exhaustive [Sec. 74]

The Indian Partnership Act is not retrospective, *i.e.*, it does not affect transactions which took place before the Act came into operation. [Sec. 74]

The Act is not exhaustive. Other Acts apply *mutatis mutandis*. [Sec. 74]

### DEFINITIONS AND EXPLANATIONS

#### Meaning of the term “firm” [Sec. 4]

Under the Indian Partnership Act, a “firm” signifies the partners taken collectively. Every individual forming the firm is said to be a partner in the firm, provided his relation is one of agency towards the rest of the members of the firm. If A, B and C are partners in a firm, the firm really means A, B and C taken together. Unlike a Corporation which is a legal entity, a firm is not a legal entity.



### Meaning of the term "Partnership"—Associations not Partnership [Sec. 4]

Partnership means and involves **that abstract relation of agency between two or more persons who have engaged in business for gain, having agreed to share the profits of such business.**

Partnership does not exist between members of a charitable society or religious association or a building scheme. (*Brownlie v. Russell*, 1883, 8 App. Cas. 235 ; *Auld v. Glasgow Bldg. Society*, 1887, 12 App. Cas. 197.) Members of a mutual insurance society are not partners. (*Gray v. Pearson*, 1870 L. R. 5 C. P. 568.) In a trade combine or protection association, the relation between the members is not that of partnership. (*Caldicott v. Griffiths*, 1853, 8 Ex. Rep. 898.) A Club is not a partnership. (*Wise v. Perpetual Trustee Co., & Ltd.*, 1903, A. C. 139). Nor is a Hindu joint family or a co-ownership a partnership.

### Distinction between "Partnership" and "Firm"

Partnership is the **relationship** which exists between persons who have agreed to do **a business for gain and to share the profits thereof** under such circumstances **that the one is the accredited agent of the rest** of the members of the firm. On the other hand, the firm, does not mean a relationship, but means **the persons who carry on the business of the firm as agents of each other** and share the profits thereof.

### Meaning of the expression "Third Party" [Sec. 2 (d)]

"Third party" means a person or party other than a partner of the firm. A person who is an outsider, and with whom the firm contracts can be regarded as a third party.

### Meaning of the term "business" [Sec. 2 (b)]

Business means and includes any occupation, profession, or trade.

### Meaning of "Act of the Firm" [Sec. 2 (a)]

An act of the firm means an act or even an omission by all the partners of the firm, or by any one or more of the partners, or agent or agents of the firm, which gives the right to a third party to sue the firm. In order that an act done may be an act of the firm, it is necessary that the partner or the agent doing the act on behalf of the firm must have done that act **in the name of and on behalf of the firm** and not in his personal capacity ; further, the act must have been done **in the ordinary course of the business of the firm** ; it must

have some relevancy to the business of the firm. If it is an act which falls only within the private activities of the partner and does not fall within the business of the firm, or if it is not entered into in the name of the firm, it cannot be regarded as an act of the firm.

### Essentials of a Partnership [Sec. 4]

The following are the essentials of a partnership :—

- (1) An **agreement** between **two or more** persons to do a **business for gain** ; [such agreement must be to act presently (and not in the future and it must be executed if a partnership is to take place.) *Dickinson v. Valpi*, 1829 10 B. & C. 128.]
- (2) **Sharing of profits** of the business ; and
- (3) Carrying on of the business either by all or by any of the partners concerned, **acting for all the partners** of the firm. [The relation between the partners should be one of **agency**, so that each partner can bind the whole firm by an act **done in the name of the firm** and in the **ordinary course** of its business. (*Cox v. Hickman*, 1860, 8 H. L. 268 ; *Bullen v. Sharp*, 1865, L. R. 1 C. P. 86.)]

**Whereas sharing of profits is essential** for a partnership (*Molloy v. Co.* 1872 L. R. 4 P. C. 419), **sharing of losses is not essential**. A person may become a partner under the distinct understanding that he is not to share the losses, but to share only the profits. (*Raghuveer v. Hormasjee*, 1927, 51 Bom. 342).

The mere fact that a person is mentioned by an agreement to share the profits of the business does not make him a partner, for as laid down in *Cox v. Hickman*, (1860, 8 H. L. C. 268 ; *Bullen v. Sharp*, 1865, L. R. 1 C. P. 86), **the true test of partnership is agency, and not sharing of the profits**. A servant employed on commission basis is not a partner ; the wife or a child of a deceased partner getting the share of the profits of the firm is not a partner in it ; a lender of money to a firm who gets in consideration of the loan a portion of the profits of the firm is not a partner ; a previous owner, or part-owner of the business as consideration for the sale of goodwill or share thereof, is not a partner.

The relation of partnership arises **not from status but from contract**. The members of a Hindu undivided family (co-parceners) carrying on a family business cannot be regarded as a firm, because co-parceners or members of the family get a share in the business not by virtue of agreement but by virtue of status, *i.e.* by birth in the family. *Burmese Buddhist husband and wife* carrying on business as such are not partners in such business.

**Clauses Usually Inserted in a Partnership Agreement**

The following are the clauses usually inserted in a partnership agreement which must bear the stamp as required in the province in which the agreement is made :—

- (1) The name and style under which the business is to be carried on.
- (2) The duration of the partnership.
- (3) The place or places at which the parties will do the business.
- (4) The right of each partner in, and his contribution to, the capital of the firm.
- (5) The proportions in which the profits are to be shared ; and the proportions in which losses are to be borne. Where any partner or partners be exempted from the sharing of losses, a statement to that effect.
- (6) Whether the partners can borrow money on behalf of the firm (especially in a non-trading firm).
- (7) Whether, and if so, the extent to which the partners can draw, make, accept, indorse and otherwise deal in bills of exchange, promissory notes, cheques, hundis, etc.
- (8) The name/s of the bankers of the firm.
- (9) Whether partners will be paid interest, and, if so, at what rate, on the capital for the time being standing to his credit, and whether such interest shall be cumulative. Provisions relating to loans to the firm.
- (10) How and where the firm's books of account shall be kept, and the right of the partners to have access to the same. Provisions relating to the Reserve Fund.
- (11) Regarding the annual accounts and balance-sheet of the firm, and the name of the accountants, and the furnishing of a copy of the same to each of the partners.
- (12) Any provisions regarding holidays or vacation or leave to partners in turn.
- (13) Limitations and restrictions on the rights and powers of partners and on their implied authority to pledge the firm's credit or to make the firm liable.
- (14) The duties of partners. [Whether a partner can do some other non-rival business or not, as long as he remains in the firm.]

- (15) Indemnity to the firm against breach of stipulations in the Partnership Deed.
- (16) That death or insolvency of a partner shall not dissolve the firm.
- (17) Conditions relating to retirement of partners ; the mode by which a partner may retire from the firm.
- (18) Whether a new partner can be introduced, and, if so, subject to what conditions.
- (19) Whether a majority of partners, acting *bona fide*, can expel a partner guilty of misconduct or persistent breaches or conditions of the Deed of Partnership.
- (20) Conditions relating to return of premium in case of dissolution, or premature termination of the partnership.
- (21) Power to determine the partnership in certain events, and those events.
- (22) Surviving partners' option to buy up the share of a deceased partner in the capital and assets, and the terms under which the option can be exercised.
- (23) Power of partner/s to provide annuity to his/their widow/s and child/children.
- (24) Settlement of disputes by arbitration.
- (25) Conditions applicable to dissolution and winding-up of the firm. How the losses are to be paid, how the debts due to non-partner creditors and partner-creditors shall be paid, how the capital shall be redistributed after payment of the debts, and how the surplus assets shall be divided among the partners.

### **Distinction between "Firm" and "Company"**

(1) **A firm is not a legal entity** (Indian Cotton Co. v. Raghunath, 33 Bom. L. R. 111) ; but **a company is a persona legal**. (Salomon v. Salomon & Co. Ltd., 1897 A. C. 22.)

(2) **In a firm every partner is an accredited agent** of the rest of the partners (Cox v. Hickman, 1860, 8 H. L. C. 268) ; but **in a company a member is not an agent of the other members**.

(3) **In a partnership, liability is unlimited, i.e.,** each partner is liable to the extent of even his own private property for the debts of the firm in the course of the business of the firm ; (Baird's case, 1870, 5 Ch. App. 725) ; but in the case of a company which is limited, the liability of the members is **limited to the extent of the amount remaining unpaid on the shares held by them or the amount of guarantee** as mentioned in the Memorandum of Association of the Company. (Prasad v. Missir, A. I. R. 1930, Pat. 321.)

(4) In a firm, the property may be the property of the firm or may even be the separate property of individual partners ; but in a company the entire property is that of the company and not that of individual members. (George Newman Co., 1895, 1 Ch. 685.)

(5) In a company a shareholder can transfer his shares subject to such provisions as may be imposed by the Articles of the Company ; but in the case of a firm, **a partner cannot assign the whole of his share**, unless there is a contract to the contrary, without the **unanimous** approbation of the partners of the firm. (In Russell Institution, 1898, 2 Ch. 72 ; Madras Urban Bank, 62 Mad. L. J. 720.)

(6) In the case of a firm, death or insolvency of a partner, unless there is a contract to the contrary, dissolves the firm ; but in the case of a company, death or insolvency of a member of the company does not dissolve the company.

(7) In a firm, the number of members cannot exceed 20; or, in the case of a bank, 10; but in the case of a company, a private company can have as many as 50 members, and a public company can have any number of members. (Indian Companies Act.)

### “Partnership” distinguished from “Club”

A club is an association of a peculiar nature. The object of such an association is not the acquisition of profits, but the promotion of some beneficial objects, such as promotion of health, or providing recreation for its members. A member of a club is not the agent of every other member. A member of a club is not liable to a creditor of the club, except to the extent to which he took part in any contract concerned which gave rise to the liability. (In re St. James's Club, 1852, 2 De G. Mac. G. 383.) Change of membership of a Club does not affect the existence of the club, and a member of a club has no interest in the property of the club as a partner has in the property of the firm.

### “Co-ownership” and “Partnership” distinguished

(1) In the case of partnership, a partner is the agent of the other partners ; but in the case of a co-ownership, **a co-owner is not the agent of the other co-owner or co-owners.**

(2) Partnership **always** arises out of agreement ; a co-ownership does **not necessarily** arise out of agreement. Persons may become co-owners by virtue of the law of succession—succeeding to property as co-heirs or as co-legatees—or by agreement.

(3) Co-ownership does not necessarily involve a sharing of profits or losses. Partnership necessarily involves a sharing of profits though not of losses.

(4) A partner cannot, without the consent of the rest of the partners, go out of the firm and put a new partner in his place unless the partnership agreement allows him to do so. A co-owner, on the other hand, can, even without the consent of the other co-owner or co-owners, transfer **his interest** or right in the property to another person with the result that that other person steps into the shoes of the transferring co-owner.

(5) **A co-owner has no lien** on the property for outlays or expenses or for a common debt. **A partner has a lien.**

### **Partnership distinguished from Hindu Joint-family**

(1) A Partnership is created **necessarily by agreement**; but the joint-family co-parcenary is created by **status**, by birth in the family.

(2) In a Joint-family, the Karta (the manager) has authority to contract debts and pledge the property of the family for the purpose of the family business, **but the other co-parceners cannot do so.** (Wasti Ram v. Munshi, 1930 Lah. 243). In a partnership **every partner can by his act bind the firm.**

(3) In a partnership every partner is unlimitedly liable; but in a Hindu joint-family the Karta is liable unlimitedly, but **the other co-parceners are liable only to the extent of the share in the profits of the family business**, and not to an unlimited extent unless they took part in the act or transaction done by the Karta or connived in such act or transaction.

(4) A partnership is governed by the Partnership Act; a Hindu Joint-family business is governed by Hindu Law.

### **Name which a Firm can take [Sec. 4 ; 58 (3)]**

Partners of a firm may carry on the business of the firm under a name which they choose to adopt, and which they can validly adopt under the Partnership Act. (Maugham v. Sharpe, 1864, 17 C. B. N. S. 443.) The name they adopt is known as the **firm name** or the **firm's name**. The partners intending to do a new business must not take up a name so identical with the name of an existing firm as to cause confusion or deception in the locality. A fraudulent intent on the part of the newcomer is not essential (N. Cheshire Co. v. Manchester Brewery, 1899, A. C. 83.) A difficult question that arises is : Can a person trade in his own name which also happens to be the name of a rival trader ? It appears from judicial decisions that the law allows greater latitude to persons who wish to trade in their own name than in other cases, the principle being that the law will not prevent a person from trading in his own name merely because the similarity between his name and the name of the rival trader is likely to cause confusion in the locality. (Turton v. Turton, 1889,

42 Ch. D. 128.) But the court would in such a case try and have the newcomer distinguished from the existing rival trader, *e.g.*, by making the newcomer add to his name his father's name. See also *Jay's Ltd. v. Jacobi*, 1933, 1 Ch. 411).

But where a man uses his own name and still fraudulently intends to and does make his goods represent those of another trader, he will be prohibited doing so. (*Turton v. Turton*, 1889, 42 Ch. D. 128, 137).

A firm, to be registered under the Partnership Act, cannot take up a name containing any words like : 'Crown', 'Emperor', 'Empress', 'Royal', 'Imperial', 'Empire', 'King', 'Queen', or in other words expressing or implying the sanction, privilege or patronage of the Crown, or Central Government, or any Provincial Government, except when the Government signifies its consent to the use of any such word or words as part of the name of the firm, by order in writing under the hand of one of the Secretaries to the Government. A firm intending to take such name in its firm name must petition to the Central Government (by delegation, the Provincial Government) for sanction or approval. [Sec. 58 (3)]

### **Specific performance of partnership agreement not allowed**

As a partnership agreement is one, the working of which is dependant on the personal inclination and volition of the parties, there can be no specific performance of a partnership agreement. (*Scott v. Raymont*, 1868, 7 Eq. 112.)

## **REGISTRATION OF FIRMS [Secs. 56-71]**

### **Consequences of Non-registration [Sec. 69]**

In England registration of firms is compulsory. For want of registration a partner in a firm is liable to penalty at law. In India, on the other hand, registration of firms is not compulsory, and no fines are imposed on partners for not registering their firm. But, though registration in India is optional, it becomes **indirectly necessary**. Under the Indian Partnership Act, an unregistered firm cannot bring any suit to enforce a right **arising out of a contract** against an outsider. This makes registration of firms necessary. But an unregistered firm **can bring a suit to enforce a right arising otherwise than out of a contract**, *e.g.* for an injunction against a person wrongfully using the name of the firm, or for wrongful infringement of trade mark, trade name, or patent of the firm. Further, it is important to note that though a firm may not be registered *ab initio*, it can be registered even at the eleventh hour, *i.e.*, at any time before the suit is filed in Court. A partner of a firm cannot sue his unregistered firm for damages for wrongful dismissal or for share of profits, unless he also asks in the suit for the dissolution of the firm or for accounts if the firm is already dissolved. A is a

partner in a firm, and is wrongfully dismissed from the firm by the other partners. What are his rights as against the other partners of the firm ? A cannot bring a suit asking merely for damages or share in the profits, if his firm is unregistered, **but he can bring such a suit by adding in it a prayer for dissolution of the firm**, or, if the firm is already dissolved, for accounts of the dissolved firm ; and in such a case the suit would be maintainable at law, on the ground that it is a suit substantially for dissolution of the firm or for accounts of a dissolved firm. The Indian Partnership Act does not affect the powers of an official assignee, receiver or the Court under the Presidency-towns Insolvency Act and the Provincial Insolvency Act to realise property of an insolvent partner. Moreover, these provisions of the Partnership Act do not apply to undeveloped areas expressly exempted by the Central Government by notification in the official Gazette. The provisions relating to registration of firms do not apply to firms which have place of business in India and are situated in areas which, by notification of the Central Government, are exempted from the operation of this section. Certain undeveloped areas, where trade is in its infancy, can, under the Partnership Act, be exempted by the Government from the operation of the provisions relating to registration of firms.

A partner cannot sue the other partners for a mandatory injunction to have the firm registered (*Ghelabhai & Co. v. Chunilal & Co.*, 1941, Rang. 219).

### **Application for Registration of a Firm [Secs. 58 ; 60]**

The registration of a firm can be effected thus : a statement in the prescribed form, accompanied by the prescribed fee, must be sent to the Registrar of the province in which any place of business of the firm is situated or proposed to be situated ; such statement can be sent by post or may be delivered to the Registrar of the area in which any place of business of the firm is, or is to be situated. Such statement must contain the following particulars :—

- (1) the name of the firm ;
- (2) the place or principal place of business of the firm ;
- (3) the names of any other places where the firm carries on its business ;
- (4) the date at which each partner joined the firm ;
- (5) the name in full and the permanent address of each of the partners, and ;
- (6) the duration of the firm.

Such statement as aforesaid must be signed by all the partners of the firm or by their agents specially authorised to so sign. Each person signing the statement must also verify it in the manner prescribed by the rules under the Partnership Act.



A firm applying for registration must not have in its name any of the following words, namely :—

‘Crown’, ‘Emperor’, ‘Empress’, ‘Empire’, ‘Imperial’, ‘King’, ‘Queen’, ‘Royal’, or words expressing or implying the sanction, approval or patronage of the Crown or the Central Government or any Provincial Government, unless the Government has given its consent to the use of such word or words as part of the firm’s name by order in writing under the hand of one of the Secretaries to the Government.

Whenever an alteration is made in the name of the firm or in the location of the principal place of the business of a registered firm, a statement with a prescribed fee should be sent to the Registrar specifying the alteration. [Sec. 60]

### **Inspection of register of firms and of documents filed with the Registrar [Sec. 66]**

The register of firms shall be kept open by the Registrar for inspection by any person on payment of such fees as may be prescribed by the rules made under the Indian Partnership Act. All statements, notices and intimations, filed with the Registrar, must be kept open for inspection, subject to such conditions and on payment of such fees as may be prescribed by the rules made under the Act.

### **Grant of copies from the Registrar of Firms [Sec. 67]**

The Registrar must on application made by a person to him, on payment of such fee as may be prescribed, furnish to such person a copy, certified under his hand, of any entry or portion thereof in the Register of Firms.

### **Meaning of “public notice” under the Partnership Act [Sec. 72]**

A public notice, under the Partnership Act, means a notice in the local official Gazette, and in at least one vernacular newspaper circulating in the district where the firm to which the notice relates has its place or principal of business. When the firm is registered, a notice must also be given to the Registrar of firms in order that the notice can be regarded as a public notice.

### **When is public notice required?**

A public notice is required when a partner retires or is expelled from the firm, to the effect that he has severed his relations with the firm ; so also when a registered firm is dissolved. In the case also of a person who was a minor when he was admitted to the benefits of partnership, a public notice is obligatory when he attains majority;

such notice must be given within six months from the date of his having attained majority or having come to know that he was admitted to the benefits of the partnership, whichever date is later; the notice must be to the effect that he has elected to become or not to become a partner in the firm. For want of a public notice, the minor, who has attained majority will, under the Indian Law, be liable for all the debts (not time-barred) of the (entire) firm contracted since he, as a minor, had got admitted to the benefits of the partnership. Under the English Law, however, the infant (who had been admitted to the benefits of partnership) must elect to be, or not to be, a partner, within a reasonable time, of his having attained majority. If he does not give the required public notice, he will be deemed (as in India) to have become partner and shall be liable to an unlimited extent for all the enforceable debts of the firm contracted by the firm since he became a major.

### **Partnership[at Will [Sec. 7]**

When a partnership is not for a fixed duration of time it is said to be a partnership at will. A partnership at will can be terminated at any time by notice given by a partner. So also a partner can retire from his firm or dissolve it, if it is at will, at any time he so desires by giving notice in writing to the other partners of his intention to that effect. A partnership at will is deemed to be dissolved from the date mentioned in the notice as the date of dissolution. In the case of dissolution of a partnership at will, it goes without saying that no question of return of premium can arise.

Whether a partnership is at will or not can often be determined by construing properly the deed of partnership. (*Moss v. Elphick*, 1910, 1 K. B. 846.)

### **Particular Partnership [Sec. 8]**

A particular partnership is a partnership for a particular business or venture. Such a partnership is dissolved when the business or the venture gets completed.

A, a diamond merchant, and X, a diamond broker, agree to set a transaction through, by their joint labours and to share the profits resulting from their joint venture in respect of a particular packet of jewellery. If the relation between them be one of agency, we can say that there is or was a partnership between them in respect of that venture. (*Oppenheimer v. Fraser*, 1907, 2 K. B. 50.) So also two auditors engaged in a particular audit may be regarded as partners in that audit, though they are not at all partners otherwise and are in different firms of auditors. So also such may be the case in the case of lawyers. (*Robinson v. Anderson*, 1855, 20 Beav. 98.)

**RELATION OF PARTNERS TO ONE ANOTHER [Secs. 9-17]**

(1) Partners must carry on the business of the firm for the **common benefit of the firm**, and must be **just and faithful to each other**; and it is their duty to render true accounts and full information regarding all matters concerning the firm to any partner or his legal representative. [Sec. 9]

The duty to render accounts includes that of supporting the accounts by proper vouchers and documents (*Bharat v. Kiran*, 1925 52 Cal. 766) and of handing over to the firm monies of the firm. (*Har-sant v. Blaine*, 1887, 3 T. L. R. 689.)

Though partners are not, strictly speaking, trustees for their firm or for their fellow-partners (*Piddocke v. Burt*, 1894, 1 Ch. 343), yet the mutual dealings of the partners must be **fair and faithful**. *In societatis contractibus fides exuberet*, i.e. in a contractual association good faith must be amply shown.

(2) Every partner is **liable to indemnify** the firm for any damage caused to it by reason of his fraud while conducting the business of the firm. [Sec. 10]

(3) The mutual rights and duties of partners of a firm can be determined by the contract between the partners, and such contract may be expressed or implied, and can be varied by express or implied consent of **all** the partners. Where the partnership agreement prohibited drawing of bills of exchange by any of the partners without the consent of the other partners, but the other partners **actually took no objection** to one of the partners drawing bills of exchange for some length of time, it was held by the Court that the original deed of partnership was varied by implied consent by the passive acquiescence by the other partners. (*Const v. Harris*, 1824, 1 T. & R. 496.) [Sec. 11]

(4) Subject to a contract between the partners, **every partner can take part in the business of the firm and is bound to attend diligently to his duties in such business**. Subject to a contract between the partners, every partner **can have access to and inspect and copy any of the books of the firm**; any difference arising as to **ordinary** matters connected with the business of the firm can be decided by a **majority** of the partners, but every partner shall have the right to express his opinion before the matter is finally decided upon; and no change can be made in the nature of the business, i.e. the enlargement of the area of its business (1878, 8 Ch. D. 129) without the consent of **all** the partners. Having a partner's son as apprentice is an **ordinary** matter. (*Highley v. Walker*, 1910, 26 T. L. R. 685.) [Sec. 12]

(5) Subject to a contract between the partners, a partner is not entitled to receive remuneration in addition to the sharing of the profits of the firm, for taking part in the business of the firm. Doing

the business of the firm is the duty of the partner, and therefore, he is, ordinarily speaking not entitled to any special remuneration. (*Holme v. Higgins*, 1822 1 B. & C. 74.) [Sec. 13 (a)]

(6) Partners are, subject to a contract to the contrary, entitled to share equally in the profits of the firm, and have to contribute also equally to the losses sustained by the firm. (*Pitchiah Chettiar v. Subramaniam*, 1935, 58 Mad. 250) Profits include any benefit or gain derived by one or more of the partners out of the partnership business or property. As to what are "profits" depends on a true construction of the deed of partnership. (*Watson v. Haggitt*, 1928, A. C. 127.) [Sec. 13 (b)]

(7) Unless there is a contract to the contrary, where a partner is entitled to interest on the capital subscribed by him, such interest is payable only out of the profits of the firm. Interest is allowable only if there is an agreement or usage to that effect. (*Gobinda v. Haridas*, 20 C. W. N. 634.) [Sec. 13 (c)]

(8) A partner, lending the firm for the purpose of its business any money, is entitled to interest thereon at 6% per annum, unless there is an agreement to the contrary. After dissolution of the firm, interest will not, generally speaking, be allowed. (*Watney v. Wells*, 1867, 2 Ch. 250.) Sec. 13 (d)

(9) Subject to a contract to the contrary, it is the duty of the firm to indemnify a partner for payments made, and liabilities incurred by him—

- (i) in the ordinary and proper conduct of the business of the firm, and
- (ii) in doing an act, in an emergency, for protecting the firm from loss or damage, provided the partner did the act as a man of prudence in his own case under similar circumstances would do, and would be expected to do. [Sec. 13 (c)]

A partner cannot claim indemnity for an unauthorised outlay though useful. (*Dipchand v. Kishnibai*, A. I. R. 1928 Sind 133.)

(10) Under Sec. 13 (f), subject to a contract to the contrary, it is the duty of a partner to indemnify his firm for any loss or damage caused by him to it by his wilful wrong-doing while doing the business of the firm. (See *Banwarilal v. Shaikh Sukrulla*, 1940, 19 Pat. 1)

(11) Subject to a contract to the contrary between the partners, the property of the firm includes all property and rights and intrests in what is originally brought into the common stock of the firm or acquired later by purchase or otherwise by the firm or for the firm

or for the purpose and in the course of the business of the firm ; property includes the goodwill of the firm. Unless the contrary intention appears, the property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm. *In ex parte Hinds*, (1849, 3 De. G. & Sm. 613), a partner in an unauthorised manner used the funds of the firm in purchasing shares in a railway company, it was held that the shares were the property of the firm. See also *Sudarsanam v. Narsimhulu*, 1902, 25 Mad. 149. [Sec. 14]

[Goodwill implies the advantages and the good reputation that the firm has acquired by reason of its having been run by its partners in a competent and efficient manner or by reason of its long-standing and popularity in the locality. It is because of this that goodwill is regarded as a property of the firm and is subject of sale.] For a judicial definition, see *Churton v. Douglas*, 1859, John 174, 188.

(12) Subject to a contract to the contrary between the partners, the property of the firm is to be held and used by the partners solely for the purpose of the firm's business ; it cannot be used for the benefit of any individual partner. [Sec. 15]

(13) Subject to contract between the partners, if a partner gets any profit for himself from any transaction of the firm or by using the property or the business connection of the firm or the name of the firm, he shall be liable to render account for that profit, and shall have to pay it up to the firm ; (*Kuhlira v. Lambert Ltd.*, 1913, 108 L. T. R. 565) and if a partner carries on any business **competing** with that of the firm, he shall, subject to a contract to the contrary, pay to the firm all profits made by him in that business because no partner can carry on a competitive business. (*Dean v. Mac Dowel*, 1878, 8 Ch. D. 345.) [Sec. 16]

(14) Subject to a contract between the partners, when a change occurs in the constitution of a firm, the right and liabilities of the partners *inter se* in the newly constituted firm remain the same as they were immediately before the change in the constitution of the firm ; (*Dawood v. Mohideen*, 1937 2 M. L. J. 760) ; and where a firm was constituted for a fixed term and continues to carry on business after the expiration of that term the rights and liabilities of the partners *inter se* remain as they were before the expiry of the term for which the firm was formed. Where a firm constituted to do one or more types of business or undertakings carries out other types of businesses or undertakings, the rights and liabilities of the partners *inter se*, with regard to the other businesses or undertakings, shall be the same as in the case of the original business or undertakings. [Sec. 17]

### Agreements in Restraint of Trade

Though as a rule, agreements in restraint of trade are void, there are exceptions made in the case of partnership. The relation

between partners of a firm is such that a partner cannot carry on a business to compete with that of his firm; but he can do any number of other **non-competing** businesses, **unless he has agreed not to do any business other than that of the firm**. If a partner contracts that **as long as he remains a partner in the firm concerned** he will not do **any** other type of business **whatever**, such contract will be valid, in spite of the Indian Contract Act otherwise providing; in such a case the partner will be restrained from carrying on a business other than that of the firm in which he is a partner. (*Dean v. Mac Dowel*, 1878, 8 Ch. D. 345.) Secondly, when there is an agreement between the partners of a firm that any partner who ceases to be a partner will not carry on any business similar to that of the firm **within a specified or agreed period or within specified local limits**, such an agreement would be valid provided the restrictions imposed are reasonable. The restraint should not be for a long period of time; if the restraint is with regard to locality, the area should not be too large to be allowed. As to the reasonableness of the area, the nature of the business and the extent of its customers shall have to be considered; the wider the extent to which its customers are found, the wider will be the restraint allowed. The third exception will now be stated: partners can, upon or in anticipation of the dissolution of the firm, agree that some or all of them will not carry on a business **similar to that of the firm** within a specified period or within a specified local limit; such an agreement also would be valid provided the restraint with regard to the period of time or the locality is not unreasonable. [Secs. 11 (2); 36 (2); and 54]

Any partner may, when the goodwill of his firm is sold, **validly agree with the buyer of the goodwill** that he (such partner) will not carry on any **similar** business within a **specified period** or within **specified local limits**. Such agreement would be regarded as valid if the restrictions imposed are reasonable. **There must be a goodwill attached to the business**; if the business had really no goodwill, then the mere use of the word "goodwill" in the agreement will not validate the contract otherwise void as being in restraint of trade. Whether a business really has a goodwill or not is a question of fact. (*Attorney General v. Bowden*, 1912, 1 K. B. 539.)

The restraint must be reasonable, *i.e.*, really required for the just protection of the covenantee (*Nordenfelt v. Maxim Gun Co.*, 1894 A. C. 535). Reasonableness as to the local limits is judged by the nature of the business and the extent of its customers. The wider the scope of the business and the larger the area to which its customers are spread the larger is the scope of restraint. (*Kalu v. Saran*, 13 Cal. W. N. 388.)

## **RELATIONS OF PARTNERS TO THIRD PARTIES [Secs. 18-30]**

### **(1) The extent to which a Partner is an Agent**

It may be said that **partnership is but a species of agency**. (*Churn v. Eduljee*, 8 Cal. 678.) Pothier says that partnership is a

species of agency. [Sec. 18] *Contractus societatis, non secus ac contractus mandati*. Each partner is *præpositus negoties societatis, i.e.*, is deemed to be a negotiator in the partnership. A partner, being an **accredited agent** of the firm for the **purpose of the business of the firm**, can make liable the firm by his acts done in **the name of the firm and in the ordinary course of the business** of the firm. But the authority of a partner to bind the firm which is implied by the law, does not extend, unless expressly provided by the Partnership agreement, to the following matters :—

- (a) The submitting of a dispute, relating to the business of the firm, to arbitration. *Bhagwanji v. Hiraji*, 34 Bom. L. R. 1112 ; *Akbar v. Nath*, 11 Cal. L. J. 658; *Indur v. Kandadai*, 26 Mad. 49.
- (b) Opening of a banking account on behalf of the firm in the name of the partner. (*Alliance Bank*, 1871, 6 C. P. 433.) [A partner can open a banking account in the name of the firm, but not in his own name except with the sanction of the other partners.]
- (c) Compromising or abandoning any claim or portion of a claim which a firm may have against a third party (an outsider).
- (d) Withdrawal of a suit or proceedings filed on behalf of the firm.
- (e) Admission of any liability in a suit or proceedings against the firm.
- (f) The acquisition of immovable property for the firm. (*Clements v. Norris*, 1878, 8 Ch. D. 129.)
- (g) Transfer of any immovable property belonging to the firm. (*Peareyalal v. Misri*, 1940, All. 674).
- (h) Entering into partnership on behalf of the firm. (*Singleton v. Knight*, 1888, 13 App. C. 783.) [Sec. 19]

In addition to the restrictions on the implied authority of a partner which the law has imposed, as seen above, the partnership agreement may also further curtail the implied authority of a partner. But the outsider is not bound, unless he otherwise knows, by any such private contracts between the partners ; an outsider is entitled to sue the firm, and the firm cannot contend that the particular partner who contracted on its behalf had no power to enter into that contract. [Sec. 20]

(2) **Power to Borrow Money on Behalf of Firm**

In the case of a trading firm, a partner of the firm can borrow money on behalf of the firm (*Saremal v. Kapurchand*, 48 Bom. 176) ; but in the case of a non-trading firm, unless the power to borrow is given expressly by the partnership deed, a partner cannot borrow money or pledge property of the firm, on behalf of the firm so as to bind the firm unless allowed by the firm. (*Saremal v. Kapurchand*, 48 Bom. 176.) The implied authority of a partner in a trading firm extends also to drawing and accepting bills of exchange and making and endorsing promissory notes.

The implied authority of a partner allows him to draw and accept bills of exchange, **if his firm be a trading firm** ; but not so if the firm is a non-trading concern. Each of the partners in a trading firm is liable upon a bill drawn by a partner in the recognised trading name of the firm, for a transaction incidental to the business of the firm, although his name does not appear upon the face of the instrument, **and although he be a sleeping and secret partner**. (*Bunarsee Das v. Gholam Hossein*, 1870, 13 Moo. I. A. 358.) See also *Motilal v. Unao Bank*, 28 All. L. J. 1358. The same principle applies to making and endorsing of promissory notes (*Rala Singh v. Bhagwan Singh*, 1924, 2 Rang. 367). A *bona fide* holder of a bill of exchange can sue all or any of the other partners though the bill was drawn or accepted in fraud of the other partners. (*Wiseman v. Easton*, 1863, 8 L. T. 637.)

An **admission** by a partner may or may not bind the firm. Much depends upon authority express or implied given him by the firm. (*Premji v. Dossa*, 10 Bom. 358.)

[A firm is called a **trading firm** when its business includes or consists of **buying and selling of commodities**. (*Saremal v. Kapurchand*, 48 Bom. 176), *e.g.* a business of buying and selling copper and brass utensils.]

A firm of solicitors is not a trading firm, and it is not usual for a partner to draw, accept or indorse bills of exchange without the consent of the other solicitors, and it is not within the ordinary course of their business to do so.

A partner may employ assistants and servants for the business of the firm. (*Drake v. Beckham*, 1843, 11 M. & W. 315.) Even in a non-trading firm a partner has implied authority to bind his firm by drawing cheques on behalf of the firm ; but a partner in a non-trading firm cannot bind his firm by drawing a **post-dated** cheque for that would be similar to drawing a bill of exchange which could not ordinarily be done in a non-trading firm. (*Forster v. Mackreth*, 1867, 2 Ex. 163.)



### (3) Effect of Fraud of a Partner

When a partner acts in fraud of his co-partners who do not know anything about the act, the co-partners cannot be held liable for the act of the fraudulent partner, if the outsider connived or colluded with the fraudulent partner ; (Veeraswamy v. Ibramsa, 19 Mad. L. J. 221); but the firm cannot evade liability for the act of a partner, if the act was done within the scope of the partner's authority, by saying that the partner was acting in his own interest or was committing a fraud on the firm, provided the outsider did not know that the partner acting on behalf of the firm was acting fraudulently. (Hambro v. Burnand, 1904, 2 K. B. 10.)

### (4) Authority of Partners in Emergencies

In an emergency a partner can do all such acts for protecting the firm from loss or damage as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances ; and such acts properly done by the partner in an emergency, bind the firm. [Sec. 21]

### (5) Act of the Firm

In order that an act of a partner may bind the firm, it is necessary to show that the act was done **in the name of the firm** or in a manner expressing or implying an intention that the firm would be held liable. See Worcester Corn Exchange Co., 1853, 3 De G. M. & G. 180 ; Kasam Khan's case, 28 Cal. W. N. 824 ; Nath v. Bageswari Rani, 1928, Cal. 57 ; Gordhandas v. Raghuvirdasji, 34 Bom. L. R. 1137. [Sec. 22]

### (6) Effect of Admissions or Representations by Partners

Any admission or representation made by a partner regarding the affairs of a firm can be regarded as evidence against the firm, even though made in fraud of his co-partners, provided such admission or representation was made by the partner in the ordinary course of the business of the firm. (Moore v. Knight, 1891, 1 Ch. 547.) [Sec. 23]

### (7) Notice to the Firm

Notice given to a partner, who **habitually acts in the business of the firm**, with regard to any matter relating to the business of the firm operates as notice to the firm, unless the circumstances reveal a fraud on the firm committed by or with the consent of that partner. (Williamson v. Barber, 1877, 9 Ch. D. 529.) Notice given to a clerk who receives notices or to an agent of the firm operates as a notice to the firm. [Sec. 24]

**(8) Liabilities of Partners—Including Dormant Partners**

Every partner is liable, jointly as also severally, for all acts of the firm done while he is partner. The liability is unlimited and extends even to the private property of the partner concerned. Even a **dormant or secret partner**, *i.e.*, a sleeping partner who does not take active part in the business of the firm and who may not be even known to outsiders as a partner of the firm, is liable for the acts of the firm, provided such acts are binding on the firm. But a dormant partner who retires from the firm and who does not give public notice of his retirement is not liable for the acts of the firm (done after his retirement) to any person who dealt with the firm **without at that time having known the dormant partner to be a partner.** [Sec. 25]

(9) In the case of a dormant partner, public notice of his retirement, if he has retired, is required to free him from liability for acts of the firm done after he retired from the firm or after he ceased to be a partner; but he is not liable, even if he did not give such notice, to such persons who dealt with the firm **without having known** him to be a partner.

(10) When, by a partner's wrongful act or omission done in the course of the business of the firm or done with the authority of the other partners, loss or injury is caused to any outsider, the firm is liable to the same extent as the partner himself. [Sec. 26]

For the negligence of a partner in the ordinary course of the business of the firm, the other partners are liable. (*Mellors v. Shaw*, 1861, 1 B. & S. 437.) Thus where the managing partner in a coal mine kept the shaft unguarded and a workman was injured, due to that, it was held that the other partner was as much liable for damages as the negligent partner. (*Mellors v. Shaw*, 1861, B. & S. 437.) But the firm cannot be held liable for a wrongful act, default or negligence, which is not in the ordinary course of the firm's business, *e.g.* for a trespass by a partner in which the other partner never took part before or after the act. (*Patrie v. Lamont*, 1841, Car. & M. 93.) See also *Ahmedbhai v. Habib*, 28 Bom. 226; *Munshi v. Kumar*, 12 Cal W. N. 716.

(11) When a partner acting within his authority receives money or property from an outsider and misapplies that money or property, or when a firm, in the ordinary course of its business receives money or property from an outsider and the money or property is misapplied by any of the partners when in the custody of the firm, the firm is liable to make good the loss to the outsider. [Sec. 27]

The receipt of money by a partner **acting within the apparent authority of an agent**, or by a firm **in the course of its business**, from a third party, makes the entire firm liable for any misapplication

by the partner or any of the partners of the firm, **however innocent the other partners may have been**, because a partner being the accredited agent of the firm can by his act bind the principals, *viz.*, all the other partners, no matter however unaware of the transaction or the mischief. But, if the money is received by a partner not within the scope of his authority or the business of the firm, the other partners cannot be held liable, **unless they took advantage of the transaction or received the money.** (*Mara v. Browne*, 1895, 2 Ch. 69.) But what if the money received by a partner is misappropriated by the partner **before the same has gone into the custody of the firm?** If, in such a case, the money was received by the partner **in the name of or on account of the firm and in the ordinary course of its business**, the other partners can be held liable in civil law, for the misapplication by the partner who received the money, though the other partners were absolutely unaware of such receipt. But if the money was received by the partner concerned on his own **account, and not on account of the firm in its business**, then the other partners who are **innocent** cannot be held liable to make good the money because the receiving partner **could not be said to have acted as the agent of the firm on that occasion.** (*Basiruddin v. Surja Kumar*, 1908, 12 Cal. W. N. 716.)

In the business of lawyers known as solicitors, it is not within the ordinary course of their work to receive from a client money for investing the same in some good security as soon as the receiving partner can do so, unless the other partners allow the receiving partner to so accept the money. In such a case if the partner who received the money misappropriates the money, the other innocent partners cannot be held liable. (*Harman v. Johnson*, 1853, 2 R. & B. 61.) And it is not within the business of a firm of solicitors to keep in custody bearer bonds. So, if without the consent of the other partners one partner receives and keeps bearer bonds in the firm and in the name of the firm, the other partners who are not aware of the transaction, cannot be held liable if the partner concerned misappropriates the bearer bonds. (*Cleather v. Twisden*, 1885, 28 Ch. D. 340.) So also a taking of money by a solicitor partner from a client of his firm under the pretext that the money was required as a loan by another client of the firm was held not to be within the ordinary course of a solicitors' business. (*Plumer v. Gregory*, 1874, 18 Eq. 621.) It is not within the ordinary course of business of a firm of solicitors to receive purchase money of their client or money due to the client on mortgage, and the rest of the partners cannot be ordinarily held liable. (*Bourdillon v. Roche*, 1858, 27 L. J. Ch. 681.) But it is within the ordinary course of the business of solicitors to receive money in connection with a specific investment or mortgage (*Harman v. Johnson*, 1853, 2 R. & B. 61.) Receiving money for payment to the creditor of the client of the firm is also within the ordinary course of a partner's authority in a firm of solicitors. (*Earl of Dundonald v. Masterman*, 1868, 7 Eq. 504.)

Though an act be not within the ordinary scope of the business of a firm it may **by estoppel** be binding on all the partners of the firm, *i.e.*, by **reason of the firm having in the past knowingly allowed such acts**. The firm can be said to have **created a course of conduct** *inter se* the partners allowing any of them to bind the firm by similar acts thereafter also. (*Rhodes v. Moules*, 1895, 1 Ch. 236.) Thus where a person asked his solicitor, a partner in a firm of solicitors, to find out a lender of money who would advance money to him on the mortgage of his estate, and the solicitor did find out one of his other clients to lend the money, but dishonestly told the borrower that the lender wanted some handy security, and the borrower deposited with the solicitor certain share warrants to bearer which the solicitor then misappropriated, and the solicitor then absconded, it was held by the Court that the other partners, though absolutely unaware of the transaction and though innocent, were liable, because though the act of their partner was not in the ordinary course of the business of the firm of solicitors yet the firm had by the conduct of its partners created such a liability, **having in the past entered into several such transactions with full knowledge**. Estoppel then applied as against them, and they were held liable to make good the loss caused to the firm's client, by reason of their partner's wrongful act. (*Rhodes v. Moules*, 1895, 1 Ch. 236.)

For acts done by a partner not within the ordinary scope of the business of the firm, but **on his own account or outside the scope of the firm's business**, the other partners cannot be held liable. Thus where a customer of a firm deposited with his firm (bankers) for safe custody a box containing some securities and later made a loan of those securities to one of the partners in the banking firm (and not to the firm—nor on its behalf) **for his personal purpose** and that partner placed in the box certain shares as security for the loan of the securities, and afterwards took out of the box the shares and used them away for his own purpose, the other partners who were not aware of the transaction were held free from liability, though the box and its key were in the firm's possession, because the loan was made not on behalf of the firm or to the firm **but to the partner personally**. (*Ex parte Eyre*, 1843, 1 Ph. 227.)

#### (12) Partnership by Estoppel/Representation/Holding out [Sec. 28]

Any person who expressly or by conduct represents himself, or **knowingly** allows himself to be represented to be a partner in a firm, **is liable, as if he were really a partner in the firm**, to any person who **on the faith of such representation gave credit to the firm**, whether the person representing himself or represented to be a partner **does or does not know that the representation has reached such person so giving credit**. He will be liable on the principle of **holding-out, representation, estoppel, ostentation, acquiescence**. (*Bond v. Pittard*, 1838, 3 M. & W. 357.)

(13) **Name of the Firm used after death [Sec. 28 (2)]**

When after a partner's death the business of the firm is continued in the existing name of the firm, the continued use of that name or the name of the deceased partner as the part of the name of the firm shall not of itself make the legal representatives of the deceased partner or his estate liable for any act of the firm done after his death.

(14) **Minor attaining Majority [Sec. 30]**

A minor who was admitted to the benefits of a partnership during his minority must, within 6 months from the date of his attaining majority or of his obtaining the knowledge that he was admitted to the benefit of partnership, whichever date is later, give **public notice** that he has elected to become or that he has elected not to become a partner in the firm; if he elects to be a partner, or if he fails to give public notice to the effect that he does not elect to be a partner, he would be liable for the debts of the firm contracted **since the time he was admitted to the benefits of the partnership**. Under the English law, the liability of the minor on attaining majority would arise, for his having failed to give public notice, for debts of the firm contracted **since the time he attained majority**, but not for debts contracted while he was a minor. Under the Indian law it is different and the liability is also for all acts done during the minority. According to the English law, the public notice must be given within a reasonable time (not six months as in India).

**Partnership by Holding—Out (Representation—Ostentation—Reputation—Acquiescence—Conduct [Sec. 28]**

When a person who is not really a partner falsely represents to another person that he is a partner, and that person or an outsider enters into a contract with the firm with regard to which the representation was made, **giving credit to the firm on the strength of such false representation**, such person or the outsider, as the case may be, can sue the person who pretended to be partner though he was not really a partner of the firm. Likewise, if a person **knowingly** allows partners of a firm to falsely represent to an outsider that he is a partner in the firm, he will be liable as if he really was a partner, **if the outsider gave credit to the firm on the faith of the representation that he was a partner**. A knows that X and Y, partners in a firm, are falsely representing to the members of the public that A is a partner in their firm. A must give notice in the locality denying that he is a partner; if he does not take steps to disestablish what the partners have been wrongfully doing, he would be liable to any third party who *bona fide* deals with the firm on the faith of the representation that he is a partner in the firm. This is said to be **partnership by**

**estoppel or reputation or ostentation.** When a person falsely represents to others that he is a partner, he will be regarded as a partner by reason of such false holding-out; in such case it will be known as a partnership by holding out or by false pretensions or representation; and the person who made such false representation would be estopped from denying in a Court of law that he was a partner at the time the outsider contracted with the firm. (*Bond v. Pittard*, 1838, 3 M. & W. 357.)

Words or conduct, falling short of an unequivocal representation, cannot be regarded as sufficient to create a partnership by estoppel. Thus the mere declaration of an intention to become a partner is not sufficient to cause a partnership, by holding out. In such a case, before dealing with the firm, the outsider must make a sufficient inquiry and ascertain whether the person, who had expressed his intention to become a partner in the firm had actually become one or not; otherwise he cannot hold that person liable as a partner of that firm. (*Low v. Bonverie*, 1891, 3 Ch. 101; *Bourne v. Freeth*, 1829, 9 B. & C. 632.)

The representation that one is a partner in the firm concerned **need not have come directly**; it is sufficient that A stated to B that he was a partner in the firm concerned, and that B repeated that to C or C to X, Y and others. If C, X, or Y, honestly relying on B's statement, dealt with the firm, then A is as much liable as if he himself had directly made the statement to the plaintiff, **because A, the person making the statement, either intended it to be repeated, or he knew or ought to have known, that the statement was likely to be repeated.** (*Dickinson v. Valpy*, 1829, 10 B. & C. 128.)

### **Sub-Partnership—The Rights of Sub-Partner [Sec. 29]**

A sub-partnership is, so to say, a partnership within a partnership. A, B and C are partners in a firm. A has a four-anna share in the firm. Now A takes one P to share with him 2 annas out of the 4 annas as his share that he gets from the firm. This is called a sub-partnership, by reason of A having agreed to give a portion of his share to P. P is a sub-partner, and can claim the agreed share; but he can have **no right against the main firm to take part in or to interfere with its business or to examine its accounts.** See *Seodayal v. Joharmull*, 1923, 50 Cal. 549; and *Chetti v. Chetti*, 36 Mad. L. J. 511. So long as the main partnership **continues to function**, the sub-partner cannot ask for accounts of its business. (*Watts v. Driscoll*, 1901, 1 Ch. 294.) P, the stranger, who has become sub-partner with A, **cannot be regarded as a partner of the main firm**; P is only a partner with A. If the main firm is dissolved, or if A the transferring partner ceases to be a partner in the main firm, the transferee can, as against the remaining partners, receive the share

of the assets of the firm to which the transferring partner is entitled, and for ascertaining that share he can also demand an account as from the date of the dissolution of the main firm.

The sub-partner or transferee is subject to all equities existing between the firm and the transferor. See also 1868, 3 Ch. App. 703.

### **The position of a minor admitted to the benefits of partnership**

With the **unanimous approbation of the partners** of the firm, a minor can be **admitted to enjoy the benefits of partnership** but he **cannot become a partner**. (Mandal v. Krishnadhan, 49 Cal. 560.)

The law relating to this topic has already been discussed while dealing with 'capacity of parties to contract', under note dealing with the law on Minors and Partnership. (See the notes under the Law of Contracts.)

A minor admitted to the benefits of partnership can claim the agreed share of the profits and of the property of the firm, and can have inspection of the accounts of the firm (but not books of the firm) other than the account books which the partners also can have access to. But the minor cannot actually **sue** the partners for an account or for the share due to him in the property or profits of the firm, except while severing his connection with the firm, in which case the other partners or any partner entitled to dissolve the firm upon notice to other partners may elect (in such suit by the minor) to dissolve the firm, and then the Court shall proceed with the suit as one for dissolution and accounts between the partners; and then the amount of the share of the minor shall be determined along with the shares of the partners.

A minor sharer's share can be made liable for the acts of the firm, but the minor is not personally liable for any such act.

[As in England, in India, the minor admitted to the benefits of partnership cannot during his minority be adjudged an insolvent. (Re Malji, 7 Bom. 411; Mandal v. Ghose, 42 Cal. 225.) Persons who are majors in the firm can be adjudicated insolvent, but a minor cannot be declared insolvent.]

A minor's guardian cannot, on behalf of the minor, enter into a contract of partnership with an outsider so as to make the minor a partner with the outsider, for a minor cannot be a partner. (40 Mad. L. J. 153).

### **Introduction of a Partner in a Firm—Liability of a New Partner** [Sec. 31]

Subject to a contract between the partners no person can be introduced as a partner into the firm without the approbation of **all** the existing partners. Because the liability of the partners is

**unlimited**, it is of the utmost importance that a person must **know beforehand his partner**, and it is for this reason that, unless otherwise arranged between the partners themselves, a partner cannot thrust upon the remaining partners while going out, a person whom they do not know.

A person who is introduced as a partner into a firm is **not liable for any act of the firm done before he became a partner**, unless before he became a partner he was admitted to the benefits of the partnership during his minority (in which case he will be liable for all the debts of the firm done since he was admitted to the benefits of the partnership, provided such debts are not time-barred), or unless he agrees to be liable for the debts incurred by the firm before he became a partner (in which case he will be liable *inter se* the partners **but not to outsiders**). (Russa Engineering Works, 1926, 49 Mad. 930.)

### **Retirement of a Partner [Sec. 32]**

A partner can retire in accordance with an express agreement by the partners, or with the consent of all the other partners; but if the partnership be at will, *i.e.*, not for a fixed period, a partner can retire at any time at his option by giving notice in writing to all the other partners of his intention to retire.

A retiring partner may be exempted from liability to any outsider for acts of the firm done before his retirement by an agreement express or implied made by him with such outsider and the partners of the reconstituted firm. A, who is a partner in a firm, retires from the firm; before he retires, the firm had done an act for which it became liable to X. Now when A retires, A, X, and the remaining partners of A, enter into an agreement whereby A, the retiring partner, is exempted from liability which the firm had incurred while A was a partner. Such agreement being valid at law, A the retiring partner will no longer be liable to the outsider, and the outsider's only claim would be against the remaining partners.

In spite of the retirement of a partner from a firm, he and his firm will remain liable to third parties for all acts of the firm done after the date of his retirement, **unless and until public notice is given of the retirement**. (Searf v. Jardine, 1882, 7 App. Cas. 345.) For the meaning of 'public notice', the reader may turn to the opening portion of this Chapter dealing with definitions and explanations. But a retired dormant partner is not liable to any outsider who deals with the firm without knowing that he was a partner, because in such a case the outsider could not be said to have given credit to the firm on the strength of the retired partner functioning as a partner of the firm. A dormant partner **who was not known to the outsider (plaintiff)**



cannot be held liable for an act of the firm done after he ceases to be a partner though no public notice has been given to the effect that he ceased to be a partner.

### **Expulsion of a Partner [Sec. 33]**

If the partnership agreement gives **any majority** of the partners a power, **in the exercise of good faith**, to expel from the firm any partner, **for some justifiable reason**, such majority of the partners can by a *bona fide* exercise of such power expel a partner from the firm. But if the partnership deed gives no such power to the majority, the majority cannot expel any partner of the firm. (Carmichael v. Evans, 1904, 1 Ch. 486.) Where an inquiry is to be held in the conduct of the accused partner he should be given an opportunity of answering the charges levelled against him. (Das v. Behari, A. I. R. 1928, Oudh, 424.) See also 47 Cal. 623.

Where a partner has been wrongfully expelled by a fraudulent or *mala fide majority*, the Court will not allow the expulsion. (Blisset v. Daniel, 1853, 10 H. L. 493.)

Public notice is essential even in the case of an expelled partner. If the expelled partner or the firm or anybody on behalf of the expelled partner has not given public notice of the severance of the expelled partner's relations with the firm, the expelled partner can be held liable for the debts of the firm contracted even after the expelled partner ceased to be a partner.

### **Insolvency of a Partner [Sec. 34]**

**Subject to a contract to the contrary**, insolvency of a partner dissolves the firm.

A partner in a firm must cease to be a partner when he is adjudicated insolvent by a competent Court of law ; he must cease to be a partner as from the date of the Order of Adjudication passed against him. The firm is not liable for the act of an insolvent partner. (Thomson v. Frere, 1808, 10 East 418.)

### **Death of a Partner**

In the case of death (or insolvency) of a partner the partnership comes to an end, unless there is a contract to the contrary stating that death shall not dissolve the partnership. [Even when there is such a contract to the contrary, the insolvent partner must cease to be a partner in the firm.]

### When is No Public Notice Required ?

In the case of insolvency, no public notice is required because insolvency itself is a published fact. No public notice is required in the case of death of a partner.

### Rights of out-going Partners [Secs. 36-37]

(1) A partner who goes out of the firm can carry on a business competing with that of the firm and he may even advertise such business, but, subject to a contract to the contrary, he **cannot use the name of the firm or represent himself as an agent of the firm or solicit the customers of the firm he left.** [Sec. 36]

(2) A partner who goes out of the firm without there having been an official statement of account between the rest of the partners of the firm and himself, is entitled to claim from the firm **such shares of the profits made by the firm since he ceased to be a partner as can be attributed to the use of his share of the property of the firm** ; in the alternative he can claim interest at the rate of 6 per cent. per annum on the amount or value of his share in the firm's property. This applies also to the case of a deceased partner ; the estate of the deceased partner is entitled either to claim interest at 6 per cent. per annum on the amount of the deceased partner's share in the property of the firm with which the remaining partners are carrying on the business without there having been a statement of accounts, or can claim such share of the profits made by the remaining partners, since the death of the deceased, as may be attributable to the use by the other partners of the deceased's share of the property of the firm. [Sec. 37]

See the Privy Council case : *Musaji v. Hashim* (1915, 42 Cal. 914). The principle of law is : *Accesorium sequitor principale*, i.e., the accessory follows the principal. (See also *Kamal v. Haji*, 1922, 49 Cal. 906.)

Once the option (i.e. to interest or to the share) is exercised, there cannot be a retracting from the same (*Dewar v. Maitland*, 1866 Eq. 834) ; nor can both the rights be exercised, because the rights are only alternative rights.

In determining the profits attributable to the use of the share of the partner concerned the Court will consider the nature of the business, the way in which the property is employed, the nature of the management and the subsequent conduct of the parties (*Manley v. Sartori*, 1927, 1 Ch. 157.) (See also *Sahul v. Sultan*, 1947, Mad. 287), where the liabilities of the firm were also considered.

### Dissolution of a Firm [Sec. 39-47]

The dissolution of a firm means the **discontinuation of the jural relation** existing between **all** the partners of the firm. [Sec. 39] The difference between the dissolution and retirement of a partner should

be noted. In the case of retirement or expulsion of a partner there is, in practice, no dissolution of the firm. The particular partner goes out but the remaining partners carry on the business of the firm. In the case of dissolution, on the other hand, the whole firm is dissolved. The partnership terminates as between each and every partner of the firm.

Dissolution of a firm can be brought about :—

- (a) by act of the partners themselves ;
- (b) by operation of the law ;
- (c) by intervention or order of the Court.

### **Dissolution by act of the Partners Themselves**

Partners themselves may agree to dissolve the partnership ; if all the partners consent or contract to dissolve the partnership, dissolution takes place. [Sec. 40] Where the partnership is at will, *i.e.* not for a fixed period, it can be dissolved by any partner giving notice to that effect ; the date of dissolution is the date mentioned as such in the notice of dissolution. (*Singh v. Ram Chand*, 1923, 5 Lah. 23.) The notice must be in writing and communicated to all the partners, unless there be a contract to the contrary. (*Wheeler v. Wart*, 1838, 9 Sim. 193.) [Sec. 43]

A partnership is also dissolved by efflux of time ; it may have been formed for a particular period of time ; after the lapse of that period the partnership comes to an end. [Sec. 42]

The completion of the venture dissolves the partnership.

### **Partnership dissolved by Operation of Law**

The adjudication of a partner or the death of a partner dissolves the whole firm, **unless there is an agreement to the contrary**. But the adjudication of all the partners or of all but one as insolvent **always** automatically dissolves the whole firm. [Sec. 41]

When the business of the firm becomes unlawful or forbidden by any act or law, the partnership comes to an end by operation of the law. [Sec. 41]

### **Dissolution of Partnership by Order of the Court [Sec. 44]**

At the suit of a partner, the Court **may** (*i.e.* in its discretion) dissolve a firm on any of the following grounds, namely,

- (a) Insanity of a partner, unless the insanity is temporary.  
In the case of a **dormant** partner the Court will not allow dissolution even on the ground of permanent insanity, **except in very** extraordinary circumstances, because a dormant partner has not got to do any active work in the firm.

- (b) A partner, other than the partner suing, has become in any way **permanently** incapable of performing his duties as a partner. (*Whitewel v. Arthur*, 1865, 35 Beav. 140.)
- (c) A partner, other than the partner suing, having been guilty of conduct likely to prejudice the business of the firm. In *Pearce v. Foster*, 1886, 17 B. D. 536, the act of a partner of a mercantile firm, in speculation in cotton was regarded a sufficient ground for dissolution of the firm. So also moral turpitude may reflect discredit on the firm. (*Essell v. Hayward*, 1860, 30 Beav. 158.)
- (d) A partner, other than the partner suing, having wilfully and persistently committed breaches of agreement relating to the management of the business of the firm.
- (e) A partner, other than the partner suing, having in any way transferred **the whole** (not a part only) of his **interest** in the firm **to a third party** or having allowed his share to be charged under the provisions of rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land-revenue or of any dues recoverable as arrears of land-revenue due by the partner. Transfer of **a part** of his share by a partner to any third party (outsider) is permissible unless there is an agreement to the contrary. Though a partner **cannot** transfer the **whole** of his share to a **third party** (outsider), he can transfer **even the whole** of his share **to a co-partner in the firm**, because one co-partner can sell or transfer his share or interest to another co-partner, **and no new partner is thereby introduced**. (*Cassels v. Stewart*, 1881, 6 App. Cas. 6.)
- (f) The business of the firm cannot be carried on except at a loss. The Court may order a dissolution even though the partnership be for a fixed term. (*Rehemat-un-nissa v. Price*, 1918, 42 Bom. 380.)
- (g) Any other ground which in the opinion of the Court is a fit ground for dissolution of the partnership. This ground is called **the just and equitable ground** under which the Court can, in its discretion, order a winding up.

### Liability for acts of Partners, after Dissolution of the Firm [Sec. 45]

In spite of the dissolution of the firm partners continue to be liable to outsiders for any act done by any of them which would have been an act of the firm if done before the dissolution, **unless public notice is given of the dissolution**.

Even after the dissolution of the firm, till its winding-up is completed, partners **must account** to the firm **for any personal gains earned**. (Stevenson Sons, 1918 A. C. 239.)

On the dissolution of the firm every partner or his representative is entitled as against the other partners or their representatives to have the property of the firm applied in payment of debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights in the property. The right of a partner is supported by a general lien on the surplus assets of the firm. It is called the **equitable lien** of a partner for having the firm's property duly applied upon a dissolution of the firm. (Re Butterworth, 1835, 4 D. & Ch. 160.)

After the dissolution of the firm the authority of each partner to bind the firm continues in spite of the dissolution so far as may be necessary for winding-up the affairs of the dissolved firm and for completing transactions begun but unfinished at the time of dissolution, **but not otherwise**. (Motilal v. Sarupchand, 1936, 38 Bom. L.R. 1058.) But the firm is not liable for the acts of an insolvent partner except on the principle of holding out, *i.e.* by **estoppel**. [Sec. 47]

#### **WAY IN WHICH ACCOUNTS BETWEEN PARTNERS ARE SETTLED—THE ACCOUNTING CLAUSE [Secs. 48, 49]**

##### **The Rule in Garner v. Murray, 1904, 73 L. J. Ch. 66**

In settling the accounts of a firm after dissolution the following rules apply, **subject to any agreement to the contrary by the partners :-**

- (1) Losses, including deficiencies of capital, must be paid first out of profits, then out of capital, and lastly, if necessary, by the partners individually in the proportion in which they are entitled to share profits.
- (2) The assets of the firm, including any sums advanced or contributed by the partners to make up deficiencies of capital, must be applied first in the payment of the debts of the firm to outsiders ; then in the payment to each partner rateably what the firm owes to him for advances as distinguished from capital ; then in payment to each partner rateably what is due to him on account of capital, and the residue, if any, must be divided among the partners in the proportion in which they were entitled to share profits. Where the assets are **not sufficient** and the partners have contributed **different** amounts towards the capital of the firm and have agreed to share equally the profits and losses,

then, unless there is an agreement to the contrary, the deficiency must be regarded as losses, and the partners have to bear the same, in equal shares (where the agreement is to share the profits and losses equally); and if one of the partners be insolvent who is unable to contribute anything towards making good the amount of the deficiency, the solvent partners are not liable to make that contribution. After the partners contribute their share of the deficiency they will be paid rateably the amount due to them by way of return of their capital. (*Garner v. Murray*, 1904, 73 L. J. Ch. 66.) [Sec. 48]

Supposing there are five partners P, Q, R, S and Y in a firm. They have agreed to share **equally** in the profits and losses. P had contributed towards the firm's capital Rs. 5,000, Q Rs. 5,000, R Rs. 10,000, and S Rs. 20,000, and Y Rs. 10,000. On dissolution, it is found that after payment of the debts and advances by the partners the assets are Rs. 20,000. So the deficiency of capital is Rs. 30,000. (Rs. 5,000 + Rs. 5,000 + Rs. 10,000 + Rs. 20,000 + Rs. 10,000 = Rs. 50,000, the total capital subscribed by the partners, minus the assets available, i.e., Rs. 20,000 = Rs. 30,000 the deficiency of capital). The deficiency of capital, i.e. Rs. 30,000, is regarded as the firm's loss, and the partners have to share it in equal shares, i.e.,  $\frac{\text{Rs. 30,000}}{5} = \text{Rs. 6,000}$ . After that the capital i.e. Rs. 20,000 assets + Rs. 30,000 got by contributions of the partners, will be distributed rateably among the partners. [The contributions by the partners towards the deficiency need not be actual; the same may be **notional**, i.e. by adjustment of the amounts payable to the partners as the distribution of capital. (*Garner v. Murray*, 1904, 73 L. J. 66.) In this illustration, supposing one or more of the partners is insolvent who is unable to contribute anything whatever towards the deficiency. Then, unless there is an agreement to the contrary, the other partners will not have to contribute to that insolvent partner's share of the losses. So, supposing, in our illustration, P is insolvent, then Q, R, S and Y will get rateably in the distribution of: Rs. 20,000 (assets) + Rs. 6,000 + Rs. 6,000 + Rs. 6,000 + Rs. 6,000 (contributed by Q, R, S and Y respectively = Rs. 44,000. (See the rule in *Garner v. Murray*, 1904, 73 L. J. 66.)]

When there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be used in the first instance in payment of the firm's debts and, then if anything remains, the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of each partner shall be applied first in the payment of his separate debts, and the surplus, if any, in the payment of the firm's debts. [Sec. 49]

### Rules relating to return of premium in case of premature dissolution of Partnership [Sec. 51]

When a partner has paid a premium while entering a firm as a partner, the partnership being for an agreed duration (say for 10 years), and the firm is dissolved before the expiration of the stipulated period (say in 5 years or 3 years), the question that arises is whether a partner who paid a premium in consideration of partnership being for the agreed period can get any return of the premium when it is prematurely dissolved. If the partnership is not for a fixed term, then no question of return of premium could arise ; but in the case of partnership for a fixed duration, the question of return of premium will come in, unless the partnership is dissolved by death of a partner, or unless the dissolution of the firm is caused by his misconduct (but **not mere incompetence**, especially when the other partners knew of it when they took the premium and admitted the partner —*Brewer v. Yorke*, 1882, 46 L. T. 289 ; *Atwood v. Maude*, 1868, 3 Ch. App. 369), or is in pursuance of an agreement, and that agreement contains no provision for return of premium or any part of the premium. The Court can allow the return of the premium or the portion of the premium in the case of premature termination of the partnership, on the ground of total or partial failure of consideration in respect of which the premium was paid (*Edmonds v. Robinson*, 1885, 29 Ch. D. 170), because premium is a sum of money paid towards the goodwill of a business by a person who is admitted as a partner in that firm so as to give him the benefit.

In considering the question of the amount to be refunded to the partner concerned, the Court will consider the nature of the profits earned by the firm and enjoyed by the partner concerned before the dissolution of the firm, the period for which the firm was to continue and the period within which it got dissolved, and the amount of premium actually paid by the partner, and then the Court will determine how much of the premium should be refunded to the partner concerned. See *Wilson v. Johnston*, 1873, 16 Eq. 606 ; *Atwood v. Maude*, 1868, 3 Ch. App. 369.

## CHAPTER XXI

### NEGOTIABLE INSTRUMENTS

#### [THE NEGOTIABLE INSTRUMENTS ACT, 1881]

##### Uniformity between the English and the Indian Law

The law relating to Negotiable Instruments in India is based upon the English Common Law relating to bills of exchange, cheques, and promissory notes. The Indian Act codifies the English Common Law subject to only a few differences. (Subba Narayana v. Aiyar, 30 Mad. 88 ; Raghunathji v. Bank of Bombay, 34 Bom. 72, 83.)

##### Application of the Negotiable Instruments Act, 1881 [Sec. 1]

The Negotiable Instruments Act does not apply to hundis, unless the parties to the hundi concerned have agreed, by express writing on the hundi, that, in case of dispute, local usages and customs would not apply but the provisions of the Negotiable Instruments Act would apply, or unless a local usage or custom is silent on the point in dispute. As a rule the local usages and customs apply to hundis (Mangumal v. A. L. V. R. C. T. Firm, 4 M. L. T. 309) ; and the Negotiable Instruments Act applies only when there is no custom on the point in question ; (Krishnaset v. Valji, 20 Bom. 488 ; Chetty v. Chettiar, 26 Mad. 526.) but, as already stated, the act can be made expressly applicable.

[A hundi means a negotiable instrument in an oriental language.]

### DEFINITIONS AND EXPLANATIONS

#### Definition of 'Promissory Note'—Explanations [Sec. 4]

A promissory note is an instrument in **writing** (not being a bank-note or a currency-note) containing an **unconditional** undertaking, **signed** by the maker, to **pay** a **definite** sum of money **only** to, or to the order of, a **certain** person.

By India Act XXIII of 1946, *i.e.* the Reserve Bank of India (Amendment) Act, 1946, section 31 (1), **no person** (other than the Reserve Bank or the Central Government) **can make or issue a promissory note payable to bearer.**

A promissory note must be **unconditional**, *i.e.*, not subject to any condition like that of payment "when in funds". (Carlos v. Fancourt, 1794, 5 T. R. 482.) There must be a **promise** to pay ; if there is no promise to pay the instrument is merely an **I.O.U.** (I owe you). (Laxmibai v. Raghunath, 25 Bom. 273.) The payee



must be a definite person and the payment should not be of anything other than money. "I promise to pay B Rs. 500 and to deliver to him my white horse on the first January next" is not a promissory note, because this is not a promise to pay money only, but also to deliver the white horse. The instrument is, therefore, not a promissory note. (See *Chetti v. Chetti*, 4 Mad. 296). A promise to pay a sum of money to a definite person on the death of a person, is not deemed to be conditional, because death is an event which is certain to take place some day. The signature on a promissory note may be by a mark or a cross. It has been held that a signature in pencil is also valid. (*Geary v. Physic*, 1826, 5 B. & C. 234.) Words like "writer's self", "my own hand-writing", or "my own act" written at the foot of the instrument whereby the writer shows that he is bound by the instrument, can be regarded as proper signature. (*Jerunissa Begum v. M. Kharsetji*, 6 Bom. H. C. R. 36.) The signature need not be at the end ; it need not be in any particular place or part of the document. (*Das v. Lal*, 1 All. 683 ; see also 10 Bom. 71.)

The amount of money payable under a promissory note is regarded as a certain amount and not as uncertain, though it may be required to be paid with interest or by instalments (with a provision that if default is made in payment of an instalment the balance shall become due immediately) or at an indicated rate of exchange or according to the course of exchange.

The maker of the note must be a certain person. Where two or more persons sign the note their liabilities will be joint and several. (*March v. Ward*, 1792, 1 Peak 177). But a note cannot be signed in the alternative. (*Ferries v. Bond*, 4 B. & Ad. 679). "I, M. A. promise to pay XY" and signed by "M.A. or also P. Q." is a valid note as against M. A., but not as against P. Q.

A promissory note payable to the promissor himself or maker is a nullity, because the same person cannot be both the promissor and the promisee. But if such a note is indorsed by the maker to some other person or indorsed in blank it becomes a valid promissory note. (*Gay v. Landal*, 1848, 17 L. T. C. P. 286.) A pro-note made payable to "one and each of our order" is valid if made by several persons and endorsed by one of them, so that one becomes liable on it. (1847, 11 Q. B. 19.)

It is usual to mention in a promissory note the words "for value received", but such a statement is not essential for the validity of the note, because the note is presumed to be for consideration, unless the contrary be proved. (*Hatch v. Traves*, 11 A. & E. 702). Debentures of the Bombay Improvement Trust have been held to be promissory notes. (*Mascarenhas v. Mercantile Bank of India*, 34 B. L. R. 1.)

An undated promissory note is deemed to have been dated on the date at which it was delivered. (*Giles v. Browne*, 1817, 6 M. & W. 573.)

The holder can prove by parol evidence that the note was meant to actually operate from some future uncertain period and not from the date it was delivered. (*Davis v. Jones*, 1856, 25 L. J. C. P. 91.)

### Definition of Bill of Exchange—Explanations [Sec. 5]

A Bill of Exchange is defined as an instrument in **writing** containing an **unconditional** order, signed by the maker, **directing** a certain person to **pay a certain** sum of **money only** to, or to the order of, a **certain** person or to the bearer of the instrument. A promise or order to pay is not conditional merely because the time for payment of the amount or any instalment thereof is expressed to be on the lapse of a certain period after the occurrence of the specified event (like death) which, according to the ordinary expectation of mankind, is certain to happen, though the time of its happening may be uncertain. The sum payable is to be construed as certain even though it includes future interest or is payable at an indicated rate of exchange or is according to the course of exchange and although the instrument provides that if default is made in payment of an instalment the balance shall be payable immediately.

A bill expressed to be payable out of a specified fund is void as a bill, because it is not certain whether that fund will exist or be sufficient at the time of actual payment. (*Donkes v. Deloraine*, 1770, 3 Wills, 207.)

The payee may be misnamed or may be designated by description only, but that does not affect the validity of the instrument. Extrinsic evidence can be given to identify the drawee or the payee who is misnamed or wrongly described. (*Willis v. Barret*, 1816, 2 Stark 29; *Jacobs v. Benson*, 1855, 20 Maine 132.)

A bill of exchange is also sometimes spoken of as a **draft**. When it is drawn by a bank on its own branch, it is called a **bank draft**. It must be in writing and it must contain an **order, not a mere request**, to pay a certain sum of money only to a person named in the instrument. Thus, in *Little v. Slackford*, (1828 M. & W. 171), where the alleged bill stated: "Mr. Little, please let the bearer have seven pounds and place it to my account, and you will oblige," it was held that the writing was not a bill of exchange, **because it was too much in the nature of a request**, and showed that **the drawer really had no right to call upon the drawee to pay**, but was merely beseeching him to pay the amount and thus oblige and place it to his (the drawer's) account. Mere "chits" for payment of certain sums of money are not bills of exchange. (*Rangildas v. Vrijbhukhan*, 17 Bom. 684.)

An instrument payable to “**dhani**” on demand is not a bearer instrument and cannot be negotiated by mere delivery ; nor is it an infringement of the provisions of the Reserve Bank of India Act. (*Jetha v. Vithoba*, 16 Bom. 689.)

In a bill of exchange there are three parties to the bill when the bill is made ; we have (1) the drawer, (2) the drawee and (3) the payee. The drawer is a person who directs the other person, namely the drawee, to pay a certain sum of money to the payee. The drawee is the person who is directed by the drawer to pay money to the payee.

Under the Reserve Bank of India Act **no person** (other than the Government or the Reserve Bank) **can draw a bill of exchange payable to bearer on demand**. If it is payable to bearer it must be payable otherwise than on demand. If it is payable on demand, then it must be made payable to order and not to bearer.

In the case of a **promissory note**, the person who makes it is called the **maker**, but in the case of **bill of exchange** the person who makes the bill is called the **drawer**. In the case of a cheque, the cheque being a bill drawn on a specified banker, the maker is said to be the drawer of the cheque.

Unless a bill is signed by the drawer of it, no action could lie on it against the drawer or even against the acceptor or any other indorser who signed it. (*Goldmid v. Hampton*, 1858, 5 C. B. N. S. 94.)

The payee can indorse the instrument in favour of another person, or in blank by merely putting his signature on the instrument. By indorsement or by delivery other parties also become parties to the instrument and get rights and incur liabilities on the same. The drawer and the payee can be the same person ; and the same person may be made the drawee and payee ; but there it can only be enforced at law if the drawee has indorsed it. (*Holdsworth v. Hunter*, 10 B. & C. 449.) When a bill is drawn by more than one drawer, they are jointly liable, but no bill can be drawn with a liability in the alternative, *e.g.*, A or B or C directs X to pay a sum of Rs. 100 to Y. A bill cannot be drawn on two or more drawees in the alternative because that would create difficulties when the bill is dishonoured ; but there can be what is known as “**the drawee in case of need**”, *i.e.*, a drawee who is to be resorted to if the original or first mentioned drawee fails to accept or to pay.

### Consequence of a bill or note being void as such

When a document purporting to be a bill or a note fails as such, it can be made use of as an ordinary contract giving an action in debt, though not on or as a negotiable instrument.

### Points of Distinction between Bills and Prom. Notes

(1) In the case of a promissory note the maker of the note is **primarily** liable on it ; in the case of a bill of exchange the drawer's liability (after acceptance) is **secondary**, *i.e.*, he is liable if the drawee, having accepted the bill, fails to pay the money due on it, provided notice of dishonour is given to him within the prescribed time.

(2) A promissory note cannot be made conditional, and so also a bill of exchange cannot be made conditional ; but a bill of exchange can be **accepted conditional with the consent of the holder**.

(3) The maker of a promissory note is in **immediate** or **direct** relation with the payee and is primarily liable to the payee ; but a drawer of an accepted bill of exchange **does not stand in immediate relation with the payee or the holder** because the payee or the holder has first to have his recourse against the acceptor, *i.e.*, first has to ask the acceptor to pay up.

(4) In the case of a promissory note, the rules relating to presentment for acceptance, acceptance, and drawing in sets do not apply ; in the case of bills there is presentment for acceptance to determine the maturity of the bill, and there are acceptance and drawing of bills in sets.

**Definition and explanation of the term "Cheque"—Various Types—**  
**Acceptance—Marking or Certifying Cheques : "Good for payment on..... 19...."**

A cheque is a bill of exchange **drawn on a specified banker and not** expressed to be **payable otherwise than on demand**. A cheque is always payable on demand. If it is **post-dated**, it is payable on the date mentioned on it, but not before that. A cheque is payable during the usual banking hours provided there is no irregularity on the cheque. A cheque may be payable **to bearer** or **to order**. A cheque is a bill of exchange, but every bill of exchange is not a cheque, for a cheque is a bill of exchange drawn on a banker, the drawee being always a banker. A cheque may be dated on Sunday. When a cheque is not crossed it is called an **open** cheque payable at the counter. But a **crossed** cheque cannot be cashed at the counter; the money is collected in the account of the holder. [Sec. 6]

A cheque may be a **marked cheque**, *i.e.*, a cheque marked or certified by the drawee banker with words to the effect that it would be honoured on the day of presentment for payment. A cheque requires no acceptance ; but in some places, due to a custom, the drawee bankers mark cheques as good, for clearance. Such marking constitutes acceptance of the cheque so as to make the drawee banker liable to pay the amount of the cheque at the due date of payment. (*Goodwin v. Robert*, 1875, L. R. 10 Ex. 351). Where there is no

such custom for marking cheques, an initialling or marking would mean that the drawee bank has sufficient funds of the drawer to honour the cheque. (Imperial Bank of Canada v. Bank of Hamilton, 1903, A. C. 49.)

A cheque marked "**good for payment on.....(a stipulated date)**" is not, except in special circumstances, an accepted cheque like an accepted bill of exchange so as to make the banker (drawee) who so marked the cheque liable to pay the amount of the cheque. Sufficient indication must be conveyed by the words used, if the same are to be construed as acceptance. Ordinarily, a certification or marking of a cheque with the words "good for payment on..... 19...." is not an acceptance and the drawee banker is not liable (by such writing) to pay the amount of the cheque. (Bank of Baroda v. Punjab National Bank Ltd., 71 Ind. App. 124; 1944 A. C. 176.) This is so, unless there is an unmistakable custom regarding acceptance in which case the marking may amount to acceptance.

### Distinction between Cheques and Bills of Exchange

(1) Every cheque is a bill of exchange, but every bill of exchange is not a cheque. A cheque is a bill of exchange drawn on a **banker**; but in the case of a bill of exchange other than a cheque, the drawee may be **any person**.

(2) In the case of a bill of exchange, days of grace are allowed (if it is not payable on demand or at sight or on presentment, but is payable after so many days after demand (being stipulated) or **after** sight or after presentment); so the instrument becomes mature and actually payable on the third day after the day on which the money is expressed to be payable. No days of grace are allowed in the case of a cheque.

(3) A bill must be duly presented for payment or else the drawer will not be liable for non-payment of the money by the acceptor. In the case of a cheque the drawer is not discharged from liability by the delay of the holder in presenting the cheque for payment, unless, by reason of such delay, the position so changed, for example, by failure of the bank, that the drawer could no longer be held liable. A is given a cheque by B; A delays **unduly** in presenting the cheque at the bank for payment; and before he could present it for payment at the bank, the bank fails. The payee cannot now have recourse against the drawer who is discharged from liability; the payee's only recourse would be to proceed against the liquidators of the bank in its liquidation, or if the bank be a **firm**, to prove against the Official Assignee or Receiver in the insolvency of the firm. On the other hand if there was **no undue delay** in presenting the cheque for payment and the bank failed before the cheque is presented for payment, the drawer will not be discharged from liability.

The drawer stands discharged from liability **only to the extent to which he had funds in the bank**. If he gave a cheque for Rs. 5,000 while he had Rs. 3,000 in his bank, he would be discharged not to the extent of the full amount of Rs. 5,000, but only to the amount he actually had in his bank to his credit, *i.e.* Rs. 3,000 because it is of Rs. 3,000 only that the drawer has suffered a loss by reason of the delay of the holder presenting the cheque.

(4) In the case of dishonour of a cheque, by want of funds or because of countermanding, notice of dishonour is not necessary ; in the case of dishonour of a bill of exchange notice of dishonour is necessary.

### **Bill Brokers—Bill Discounters**

Bill brokers are persons who do the business of buying and selling bills of exchange, either as agents or on their own account. Generally they are persons possessing thorough experience at the Stock Exchange and are fully conversant with conditions in the money-market. Bill discounters undertake the discounting of bills and advance money before the maturity of bills.

### **Discount Brokers**

Discount brokers are persons who undertake the discounting of bills of exchange and promissory notes and the advancing of money (payable on the bills or notes) before such bills or notes become due, in consideration of the discount allowed them.

## **NEGOTIABLE INSTRUMENTS**

### **Meaning of Negotiable Instruments—Example of Instruments negotiable as also non-negotiable**

In the wider sense, a 'negotiable instrument' means a document which witnesses the right of the person named therein as the payee or the consignee, as the case may be, or the transferee from him, or the bearer (as the case may be) to the moneys payable, or the goods deliverable, under the instrument ; it is of the essence of negotiability that the holder in due course gets a good or clean title to the instrument—he gets even a better title than what the transferor had, unless the instrument is void *ab initio* (*e.g.* in *Foster v. Mackinnon*, where fraud vitiated consent *ab initio*), or the transferor's signature is forged (in the case of an instrument payable to order), or the instrument as such was made complete (not by any donee of it but) by a fraudulent person who stole it from the maker's possession.

In the narrower sense, a negotiable instrument, **under the Act**, is a bill of exchange, or a cheque or pro-note. And the Act applies to cheques, bills and notes ; to hundis, the Act applies only *mutatis mutandis*. [Sec. 13]

*Bills of exchange, cheques, promissory notes, are regarded as negotiable instruments under the Negotiable Instruments Act; but there are other documents also which, by mercantile usage and custom of trade, have come to be regarded as negotiable instruments. Documents of title, like bills of lading, railway receipts, dock warrants, wharfinger's certificates, are regarded as negotiable instruments, by mercantile usage and custom of trade and also under the Indian Sale of Goods Act. See Bechuanaland Exploration Co.'s case, 1898, 2 Q. B. 658. See also Kanniyalal v. Balaram, 31 M. L. J. 284; Anglo-India Jute Mills, 38 Cal. 127; Amarchand v. Vithaldas, 16 B. L. R. 525. Instruments, like exchequer and treasury bonds, government promissory notes, bank notes, circular notes, bonds, scripts of a foreign or colonial currency when negotiable, dividend warrants, shares warrants to bearer, are also regarded as negotiable instruments; but a share certificate, a deposit receipt, a mate's receipt are not negotiable. An "I O. U.," which means "I owe you", and which is acknowledgment of indebtedness, is not a negotiable instrument. An acknowledgment of indebtedness requires one anna revenue stamp (just as a receipt of money to a sum exceeding twenty rupees requires an anna revenue stamp), if the amount acknowledged exceeds twenty rupees; a banker's pass book account does not require any stamps.*

### Form of Acknowledgment of Debt

Address

To

Date, .....

.....(name of creditor and his address)

I.....(name of debtor) of (his address) do hereby acknowledge that I am indebted to you (state name of creditor) in respect of a sum of Rs.....being the amount payable for goods sold and delivered by you to me.

This.....day of.....19 ..

Signature of Debtor..

To

Address

(of debtor's agent)

Date, .....

(State creditor's or his agent's name)

(his address)

I.....(name of agent of debtor) of.....  
 (his address), as the duly authorised agent of  
 .....(name of debtor and his address) do hereby acknowledge that the said.....(name of debtor again)  
 is indebted to you in the sum of Rs.....being the amount of  
 money lent by you to the said.....(name of debtor).

This.....day of.....19 .

Signature of agent of debtor

### **Drawer and Drawee of a Bill [Sec. 7]**

The person who draws (makes), *i.e.* directs another to pay on a bill of exchange is said to be a drawer. The person who is directed by the drawer to pay money to the payee is called the drawee.

### **Drawee in case of need [Sec. 7]**

A drawee in case of need (referee, as spoken of in the English Law, or the "case of need") is a drawee who is named in the bill of exchange as the person to be resorted to if the original drawee does not accept the bill or having accepted it refuses to pay on it.

### **Acceptance [Secs. 7 ; 86]**

When the drawee **puts his signature** on a negotiable instrument or **puts some words showing that he has accepted the instrument and signed it**, there is said to be an acceptance of the bill. Unless and until the drawee accepts the bill he is not liable on the bill. (Goodwin v. Roberts, 1875, L. R. 10 Ex. 351). The acceptance by the drawee by his signature on the bill makes him liable on it to pay the moneys due payable. Merely writing : "accepted" is not enough. There must be the signature of the drawee on the instrument. Acceptance may be on the face or on the back of the instrument. (Young v. Glover, 1857, 33 Jur. N. S. 637.) [Sec. 7]



As a rule, acceptance must be unconditional ; but if the holder for the time being of the negotiable instrument agrees to accept a qualified acceptance, the qualified or conditional acceptance would be valid at law. If the holder is not agreeable to the qualified or conditional acceptance, the holder can treat the bill as dishonoured by non-acceptance. [Sec. 86] The signature is essential for acceptance ; unless the drawee signs on the bill there cannot be an acceptance. An oral acceptance would not do. An acceptance written even on the back has been held to be valid in law. (*Young v. Glover*, 1857, 33 J. N. S. 637.) A person is not liable as acceptor unless he has communicated the fact of acceptance, or has delivered the bill, to the holder or his agent. (*Chapman v. Cottrell*, 1865, 24 L. T. Ex. 186).

Acceptance may be (1) **general** or (2) **qualified**. Acceptance is said to be **qualified**, as opposed to a general one, when the acceptor undertakes to pay at a specified place only, **and not otherwise or elsewhere** ; or where a place of payment is specified in the bill of exchange but the drawee accepts the bill making it payable at some other place **and not otherwise or anywhere else**. [Sec. 86]

The following is a **general** acceptance :—

“Accepted, payable at the Central Bank of India Ltd”.

But the following is a **special** or **particular** or **qualified** acceptance:—

“Accepted, payable at the Shroffs Bank of Bombay, **and not anywhere else.**”

The holder is not bound to accept a qualified acceptance. He is entitled to an **unqualified** or **absolute** acceptance, free from any conditions, qualifications or modifications ; and if an unconditional acceptance is not given, he can **refuse** it, and treat the bill as dishonoured by non-acceptance.

If the holder agrees to and accepts a qualified or conditional acceptance, the same is valid, but then all other parties whose consent to such acceptance was not previously taken by the holder get discharged from liability.

### **Drawee can ask for 48 hours for deliberation before he accepts the Bill [Sec. 63]**

If the drawee requires time for deliberation, the holder must allow the drawee 48 hours (exclusive of public holidays) (*Bank of Diemen's v. Victoria Bank*, 1871, L. R. 3 P. C. 526) to consider whether he should accept the instrument. After the 48 hours are over, it is the duty of the holder to demand the instrument back from the drawee. The drawee must, when called upon to return the instrument, return it accepted or unaccepted. If the instrument is not accepted, the holder can treat the instrument as dishonoured and

give notice of dishonour to the drawer and the rest of the parties liable on the instrument. If the drawee, with whom the bill is left, destroys or mutilates it, or does not give it back, the holder, after the expiry of the 48 hours as abovesaid, can sue for the recovery of the bill, or for damages (being the value of the bill) and the costs of the suit, upon the drawee persisting in spite of notice to him to return the bill. If due to negligence of the holder the bill is given back to a wrong person, the drawee is not liable. (*Morrison v. Buchanan*, 1833, 6 C. & P. 18.) [Sec. 63]

### Meaning of "Holder" [Sec. 8]

The holder of a negotiable instrument is any person who is for the time being **entitled in his own name and right** to the possession of the instrument and to receive and recover the amount due on the instrument. (*Bojianna v. Venkatramayya*, 21 Mad. 30.)

### Different kinds of "Holders" [Sec. 8]

A holder may be **de jure holder**, that is, a holder **as a matter of legal right**; or a **de facto holder**, *i.e.*, a holder **merely by virtue of possession, but not entitled in his own right or name**. A clerk or a servant possessing an instrument for collection or custody is a holder *de facto* but not a holder *de jure*. (*Lachmi v. Madanlal*, 1947 A. I. R. All. 52). Only the holder in his own right can sue to recover the amount payable. (*Barna v. Chaudhari*, 58 Cal. 752.)

### Holder in due course [Sec. 9]

A holder may be a **"holder in due course"**. A holder in due course is a person who holds a negotiable instrument **in his own right for value and acquired it before the instrument became mature** for payment, and **without any notice of defect in title of the transferor** from whom he took the instrument. In order that the person may be a holder in due course, the following three essentials must be present:—

- (a) The holder must not have taken the instrument as a gift; there must be consideration for the instrument, and the consideration must be lawful. (8 B. H. C. R. (A. C.) 131; 43 Cal. 445) and
- (b) The holder must not have known of, or must not have had any suspicion regarding, the defect in the title of the transferor; the holder must have taken the instrument *bona fide*, and without negligence or suspicion or reasons for suspicion.
- (c) The instrument must not have become mature for payment at the time the holder took it or acquired it. (*Gopalan v. Narasamma*, 1940, Mad. 382.)

**Meaning of "Payment in due course" [Sec. 10]**

Payment is said to be in due course when the person making the payment pays **according to the apparent tenor of the instrument, in good faith, and without negligence**, to the person in possession of the instrument **under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount** mentioned in the instrument. **A payment before maturity of the instrument is not a payment in due course**, because the payment has not become due at the time it is made. Payment must be according to the tenor of the instrument.

**Tenor** is the time at which the bill is payable.

An instrument paid off before the day of maturity may be indorsed thereafter; if the person to whom it is indorsed is a *bona fide* holder he gets a good title. (*Burbridge v. Manners*, 1812, 3 Camp. 193.)

The acceptor of a bill should not pay if the drawer directed him not to pay on the bill; if he pays in spite of such directions not to pay, the payment by him cannot be regarded as payment in due course. (*Mal v. Dass*, 26 All. 495.) If the drawee or acceptor negligently pays a wrong person, he will remain responsible to pay the entire amount to the true holder. (*Persand v. McLeod*, 8 C. W. N. 841.)

**Meaning of "Inland Instruments" [Sec. 11.]**

&

**Meaning of Foreign Instruments [Sec. 12.]**

A promissory note, bill of exchange, or cheque, drawn or made in India, and made payable in India or drawn upon any person who resides in India, is regarded as **inland instrument**. All other instruments are said to be **foreign**.

In order that an instrument can be regarded as an inland instrument, the following are the two essential conditions :—

- (1) the instrument must have been drawn or made in India ;  
and
- (2) the moneys on the instrument must be payable in India,  
or the drawee must be in India.

An instrument made or drawn outside India is not an inland instrument. An instrument drawn in India upon a person resident outside India and made payable outside India is a foreign instrument. But an instrument drawn in India and either made payable in India or drawn upon a resident in India is an inland instrument. An instrument remains an inland instrument even if indorsed, and in circulation, in a foreign country. (*Hirchfield v. Smith*, 1865 L. R. I. C. P. 340.)

### Usance

The **usance** means the tenor at which a foreign bill is drawn. Tenor means the time at which the instrument becomes payable. The time allowed for payment of a foreign bill is called the usance. It is three months in the case of most of the continental bills. [For Bombay, Calcutta it is 30 days.] In the U.S.A. it varies in the States.

### Distinction between Drawer and Maker

In the case of a cheque or a bill the person who makes it and directs another to pay is known as the drawer ; in the case of a promissory note the person who makes it is known as a maker of the promissory note.

The liability of a maker of a promissory note is primary liability, but, on the other hand, the liability of the drawer of a bill of exchange or of a cheque is secondary liability *i.e.*, if the acceptor or the banker, as the case may be, does not pay, or if the drawee does not accept the bill, the holder can give notice to the drawer and make him liable.

### Meaning of Tenor

Tenor means the time within which a bill of exchange is payable.

### Meaning of "Negotiation" [Sec. 14]

"Negotiation" means the transfer of the right, title and interest of the holder thereon of a negotiable instrument, so as to give the transferee a good title, if he (transferee) be a holder in due course, even though the transferor has a bad or defective title, except in the case of forgery of the holder's signature if the instrument is payable to order, or in the case of an instrument void *ab initio*, or except in the case of an inchoate instrument completed<sup>1</sup> and transferred after it is stolen and which was not at all delivered by the maker or drawer to anybody.

In the case of a negotiable instrument payable to order, negotiation of the instrument takes place by indorsement of the holder's signature on the instrument and by delivery of the same to the indorsee or the person to whom it is handed over. In the case of negotiable instruments payable to bearer negotiation takes place by mere delivery without any indorsement.

### Difference between Negotiability and Assignability

In the case of negotiation the transferee gets even a better title than the transferor *i.e.*, he gets good or clean title, provided he is a holder in due course, though the transferor had a bad or

defective title. In the case of assignment of a negotiable instrument the assignee does not get a better title than what the assignor has; the assignee steps into the shoes of the assignor and gets the same title—good, bad or defective—as that of the transferor.

In the case of negotiation, notice of transfer is not required; but in the case of assignment notice of assignment is required at law.

In the case of negotiation consideration is presumed, unless the contrary is proved; but in the case of assignment of a chose in action *i.e.* an actionable claim, consideration is not presumed, but is to be proved by the plaintiff.

### Indorsement [Secs. 15, 16]

Indorsement means and involves the writing of something on the back of an instrument, for the purpose of transferring the right, title, and interest therein to some other person. A is the holder of a negotiable instrument. He writes on the back of it: “pay to X or order,” and signs the instrument. A is said to have indorsed the instrument to X, and when A delivers the instrument to X, A ceases to be the holder of the instrument, and X becomes the holder thereof. An indorsement on a negotiable instrument may be in **full** (or **particular** or **special** as it is known) or, on the other hand, in **blank** (*i.e.*, **general**—without the name of any indorsee). A who is a holder of an instrument puts his signature only on the back of the instrument without specifying the name of any indorsee. This is an indorsement in blank. But if A, above his signature, writes the words, “pay to X,” or “pay to X or order,” the indorsement is in full (particular).

In the case of indorsement in full, an instrument payable to bearer becomes converted into one payable to order; in the case of an indorsement in blank, an instrument payable to order becomes converted into one payable to bearer.

No particular words are necessary for a valid indorsement. (*Pattar v. Musaliar*, 33 Mad. 34.) The signature of the transferor (indorser) may be on the back of the instrument or **by allonage**, *i.e.*, by writing on a piece of paper attached to the instrument, if the space for signing on the bill is already taken up by other (prior) indorsement. (*Debi v. Secretary of State*, 13 B. L. R. 359). Even an indorsement on the face of the instrument is not invalid. (*Young v. Glover*, 1857, 3 Tar. N. S. Q. B. 637; *Mookerjee v. Dhar*, 3 B. L. R. O. C. J. 130.) The indorsement is completed by and takes effect after, a delivery of the instrument to the indorsee or the bearer. (*Denton v. Peters*, 1870, 5 Q. B. 475.) Before delivery the indorser can cancel the indorsement. (*Brind v. Hampshire*, 1836, 1. M. & W. 365; *Castrinque v. Buttingie*, 1865, 10 Moo. P. C. 94.)

The payee holder may indorse the promissory note (of which he is holder) in his own favour ; and two joint payees may indorse the note to one of them. (Khumarali v. Rao, 24 Mad. 654.)

When in a cheque or bill payable to order the payee's name or indorsee's name is wrongly mentioned or mis-spelt, he should indorse the bill according to that designation, description or mis-spelling, and, in brackets, add his proper signature. (Willis v. Barret, (1816, 2 Stark 29.)

### Facultative Indorsement

A facultative endorsement is one by which the indorser has **aggravated** his liability, *e.g.* by using after his signature words such as "notice of dishonour dispensed with" or "waiver of notice of dishonour," or "notice of dishonour not required". The effect of a facultative indorsement is to make the indorser liable, though otherwise under the Negotiable Instruments Act he would not be liable.

### Allonage

When the space on an instrument for writing indorsements is all filled, what can the holder do if he wants to transfer the instrument or negotiate it to some one else ? The holder can take a separate piece of paper, write the indorsement on that piece of paper, and then attach that piece of paper to the instrument. This is known as allonage. All the extra indorsements would be written on that slip of paper attached to the instrument. The slip of paper so attached to the instrument is known as allonage ; but "allonage" also means the act of annexing the slip of paper to the instrument. The slip of paper so attached becomes and forms part of the bill itself. (M. Debi v. The Secretary of State, 13 B. L. R. 359.)

### Persons who can indorse a Negotiable Instrument

An indorsement can be made by the holder of a negotiable instrument, or by the maker, drawer, signing it otherwise than as a maker. Every sole drawer, maker, payee or indorsee, or all of several joint-drawers, makers, or payees or indorsees, can indorse and negotiate a negotiable instrument. A payee or an indorsee can indorse a negotiable instrument if he is the holder of it. The payee of a promissory note can indorse it in his own favour. Likewise, can one of two joint payees indorse it in favour of one of themselves. (Khumarali v. Rao, 24 Mad. 654.) A person who is not a party to a negotiable instrument cannot indorse it. (Naidu v. Chetty, 45 I. C. 186.) A person, however, who "backs" a negotiable instrument with his own signature does not become an indorser but becomes a surety if the intention was to guarantee payment. (Naidu v. Chetty, 45 I. C. 186.)

When the name of a person on a bill payable to order is wrongly designated, and such person is the payee or the indorsee, he can, and should write his name or signature in the same way with the the same spelling as on the instrument. He can if he likes add his signature or name in the proper spelling in brackets after the misspelt signature.

### **Ambiguous Instruments [Sec. 17]**

An instrument is said to be ambiguous when it is capable of being interpreted as a bill of exchange or as a promissory note. A bill drawn by an agent upon his own principal can be treated as a bill or as a promissory note because the drawer and the drawee are the same person. X draws a bill on Y and negotiates it to P. Y is non-existing person. P, the holder can treat the instrument either as a bill or as a note. (*Smith v. Bellamy*, 1817, 2 Stark 223.) It would be futile to treat it as a bill, and so the holder will treat it as a pro-note. A bill drawn on an incapable person, *e.g.*, a minor or an insane person, is useless, and the holder can treat it as a promissory note.

In the case of ambiguous instruments, once the holder make his choice, he cannot retract from it. (*S. Hussein v. New Oriental Bank*, 16 Bom. 267.) If he treats it as a bill, he cannot later treat it as a note ; if he treats it as a promissory note, he cannot afterwards treat it as a bill.

### **Payment when the amount mentioned in the instrument in figures is different from the amount mentioned in words [Sec. 18]**

When the amount mentioned in figures differs from the amount mentioned in words, the amount mentioned in words is the real amount to be paid, and not the amount mentioned in figures. (*Saunderson v. Piper*, 1839, 5 Bing. 425.) The marginal figures, however may help in finding out the correct amount payable. (*R. v. Elliot*, 1777, 1 Leach. C. C. 175.) A promissory note has in the margin the figures £ 50 ; but nothing is stated in the body of the note. It was held to be a valid note for £ 50, as there was evidence to warrant the contention that the parties had intended it to be a note for £ 50. (*Henry v. Addy*, 1910, 2 I. R. 688.)

### **MEANING OF INSTRUMENT PAYABLE "ON DEMAND", "ON PRESENTMENT", "AT SIGHT" [Secs. 19, 21, 22]**

#### **Days of Grace**

An instrument payable on demand, or at sight, or on presentment is an instrument in which the moneys are payable immediately without any days of grace being allowed.

An instrument payable so many days after sight or after presentment or after the date on the instrument, becomes mature for payment on the third day after the day on which the moneys are expressed to be paid.

### **Inchoate Stamped Instruments [Sec. 20]**

When a person signs **and delivers** to another person a paper stamped as required by the law and either otherwise blank or having made thereon an incomplete negotiable instrument, he (the signatory) gives thereby *prima facie* authority to the holder (donee) thereof to make or complete upon the stamped paper a negotiable instrument, for any amount **specified by the signatory, and not exceeding the amount covered by the stamp**. If the person to whom the instrument is delivered has been told not to fill it in for the maximum amount covered by the stamp, but to fill it in for the specified lesser amount, and that person fills it in for the maximum amount covered by the stamp, he cannot sue the signatory for the maximum amount, because the signatory had expressly prohibited that. But if the person to whom such inchoate (incomplete) stamped instrument has been delivered, fills it in for the maximum amount allowed or covered by the stamp on it, and **negotiates** it to a **holder in due course**, such holder in due course would get a good title on the instrument and can sue the original signatory or other persons liable on the instrument **for the full amount** thereof. (Lloyd's Bank v. Cooke, 1907, 1 K. B. 794.) If the signor had delivered an unstamped paper, he can avoid liability. (Smith v. Prosser, 1907, 2 K. B. 735.)

If a person puts his signature on stamped paper but does **not** deliver it to another person giving him authority to complete a negotiable instrument thereon, *e.g.*, if he keeps it in his own locker or desk, and some other person steals it and negotiates it to a **holder in due course** after writing a negotiable instrument thereon, such holder in due course would not get any title to the instrument, because the instrument was **not delivered** by the original signatory to anybody. (Baxendale v. Bennett, 1878, 3 Q. B. D. 525.)

### **Points of Distinction between "Ambiguous Instruments" and "Inchoate Stamped Instruments"**

(1) The holder of an ambiguous instrument can, after having considered the instrument as a bill or as note, sue on it. But in the case of an inchoate stamped instrument, the donee of it is given authority to fill it in for any amount covered by the stamp, and until the donee fills it in, he cannot sue on it.

(2) An inchoate stamped instrument is not an ambiguous instrument (M'Cull v. Taylor, 1865, 34 L. J. C. P. 360); but it is an inchoate instrument and until made choate by the donee after deli-



very, the Court will not construe it as a negotiable instrument. But an ambiguous instrument is considered valid and the Court construes it favourably, as a bill or note, according to the final selection made by the holder. (*Mare v. Charles*, 1856, 5 E. & B. 978.)

### **Maturity of an Instrument and Days of Grace [Sec. 22]**

No days of grace are allowed in the case of instruments payable on demand or at sight or on presentment; but days of grace are allowed when the instrument is payable after sight, after presentment or after date. (*Brown v. Harradin*, 1791, 4 T. R. 148.) The instrument becomes, when days of grace are allowed, mature for payment on the third day after the date on which the money is expressed to be payable.

Days of grace were originally a matter of favour, and not of right; but now the custom is so well established that the same have become a matter of right and not merely of favour. A premature presentment does not give the right to demand payment. (*Wiffen v. Roberts*, 1795, 1 Esp. 262.)

When the day on which the promissory note or a bill of exchange is to mature is a public holiday, the instrument is deemed due on the next preceding business day.

Where a negotiable instrument is payable by instalments, it must be presented for payment on the third day after the day on which the instalment concerned is expressed to be payable. (*Oridge v. Sherborne*, 1843, 11 M. & W. 374.)

### **Minor can draw, make, indorse, negotiate, Promissory Notes, Bills of Exchange and Cheques [Sec. 26]**

A minor may draw, make, indorse, deliver and negotiate a negotiable instrument so as to bind all parties thereto **except himself**. Though a minor cannot incur liabilities on a bill or note, he can acquire rights on it and can sue upon the instrument all the prior parties to the instrument. (*Warwick v. Bruce*, 1813, 2 M. & S. 205.) A promissory note or a bill of exchange given by a person on attaining majority, in renewal of a note or a bill executed by him in minority. (*Ramaswami v. Chettiar*, 16 M. L. J. 422) is void for want of consideration. But a person who accepts a bill when a major is liable on the bill though drawn when he was a minor. (*Stevens v. Jackson*, 1815, 4 Camp. 164.)

A person is not estopped from denying liability on the instrument on the ground that he was a minor at the date of the instrument. (*Chingal Chetty v. Naicker*, 117 I. C. 133.) And a minor can sue upon a promissory note given in his favour when he was a minor. (*Sathururasu v. Bassapa*, 24 M. L. J. 363.)

A bill or note given by a minor for necessities supplied to him does not make him liable on it (Re Solty Koff, 1891, 1 Q. B. 413); this is so even though he falsely represented to the other party that he was of full age (a major), for, as the Privy Council has pointed out, there can be no estoppel against a minor. (Kanahia Lal v. Babu Ram, 8 A. L. J. 1058.) See also 16 A. L. J. 441.

**Lunatics, persons of unsound mind, drunken persons—their rights and liabilities on negotiable instruments made by them [Sec. 26]**

Bills, notes or cheques drawn or made by lunatics or persons of unsound mind or drunken persons are void as against them. An insane person can, in a lucid interval, make a negotiable instrument or indorse or negotiate it so as to be liable thereon. Under the English Law, insanity, in order to be a good defence to an action at law, must be such that the plaintiff knew of it. (1892, 1 Q. B. 599). In the case of drunkenness, the law is the same as in the case of lunatics. (See Molton v. Camroux, 1849, 4 Ex. 17.)

**Power of corporations with regard to being parties to negotiable instruments [Sec. 26]**

A corporation can draw, make, indorse, negotiate, or accept a negotiable instrument, if the power to do so is given to it by its Memorandum of Association or Charter of Incorporation or the Special Act constituting it, but not otherwise; in the case, however, of a **trading** corporation, such power is implied. (Shamnugar Jute Factory Co. v. Chatterjee, 14 Cal. 189.) A non-trading corporation or a company cannot have powers **implied** by the law to draw, make, indorse, negotiate, or accept or transfer a negotiable instrument; the power to do so has **expressly** to be given by the memorandum or by the Charter of Incorporation. (Bateman v. Midlands Railway Co., 1886, L. R. 1 C. P. 499.) **It is only in the case of trading corporations that power to do so is implied.**

**Agency [Secs. 27-28]**

Every person capable of contracting can bind himself or be bound by an **authorised** agent acting on his behalf. But it is important to note that the **general authority** to transact business and to receive and discharge debts **does not confer upon an agent the power to accept or indorse bills so as to bind the principal.** An authority to draw bills of exchange **does not of itself imply an authority to indorse bills.**

In order that an agent may not incur personal liability, it is necessary that the agent should contract **in the name of his principal**, disclosing the name of the principal, and that he **should not exceed the scope of his authority.** (Das v. Kishen, 46 Cal. 663.) An agent must write while signing a negotiable instrument after his signature or before it words such as "*per procuracionem*," or "for and on behalf

of", if he is not to incur personal liability. A person signing as "A.B., Director of X.Y. Co. Ltd." is personally liable because he does not disclose that he is contracting for and on behalf of the company. The words "Director of X.Y. Co. Ltd." are merely *personalis designatio* (showing personal designation), and are, therefore, not sufficient to free him from personal liability.

An agent should sign for an on behalf of his principal. For example he may sign thus: "For Ardeshir Burjorji, Pestonji Faramji," or "Dayabhai Ratanji, agent for Seth Tulsidas Vithaldas"; or "For the Hudson Co. Ltd., J. Brown, its Managing Director" in which cases he is not personally liable. (Chapman v. Smethurst, 1909, 1 K. B. 927). But if the agent signs: "B. Tyabji, Manager, The Abdulla Mills Ltd." he is personally liable for the words "Manager, The Abdulla Mills Ltd." do not show that liability is excused by agency. These words are merely *designatio personalis*, and not showing the existence of agency or partnership.

On a negotiable instrument, every person/party sought to be made liable, **must be disclosed**. There cannot be an undisclosed party. (Ghose v. Doss, 2 W. R. 30.)

### **Liability of Legal Representatives—Signing A Negotiable Instrument** [Sec. 29]

A legal representative who represents and manages the estate of a deceased person, after his death, **should take care when he signs a negotiable instrument that he excludes personal liability by using words such as "sans recourse" without recourse or "without personal liability," or "the estate of the deceased alone being liable"**. If he does not exclude his personal liability by the use of clear words showing that he is excluded from personal liability, he would be personally liable. The use of mere words like "A.B. Executors of C.D." would not be sufficient, because they are merely *personalis designatio* (Ammabu v. Parwathi, 33 M. L. J. 631). See also Hirjibhoy v. Ratanbai, 35 B. L. R. 969.) The use of words such as: "A.B., executor of the estate of P.Q." are merely *designatio personalis*, and A.B. is personally liable and not merely *pro tanto* the estate of the deceased. What he should have written is: "A. B. executor of the estate of P. Q., the said estate alone being liable," or "A. B. executor of P. Q. *sans recourse*."

### **FORMS**

#### **Form of Promissory Notes**

**N.B.**—Promissory notes payable to bearer (even otherwise than on demand) are absolutely prohibited and are declared illegal.

Bombay,.....19....

On demand I promise to pay A.B. the sum of one thousand rupees.

XY

Signature.

Bombay, \_\_\_\_\_ 19\_\_\_\_

Six months after date, I promise to pay to A. B. or order the sum of three thousand rupees with interest thereon at 3 per cent. per annum.

XY

\_\_\_\_\_  
Signature.

**N.B.**—The pro note as given below can be valid only if and when it is indorsed by the maker to some third party.

Bombay, \_\_\_\_\_ 19\_\_\_\_

Two months after date I promise to pay to my own order the sum of three thousand rupees.

XY

\_\_\_\_\_  
Signature.

### Forms of Bills of Exchange

**N.B.**—A bill of exchange payable to bearer on demand is prohibited and illegal.

Bombay, \_\_\_\_\_ 19\_\_\_\_

Six months after date pay to A.B. or order the sum of ten thousand rupees.

XY

To

P.Q.  
(Address)

\_\_\_\_\_  
Signature.

Bombay, \_\_\_\_\_ 19\_\_\_\_

Six months after sight pay to A. B. or bearer the sum of one thousand rupees for value received.

XY

To

P.Q.  
(Address)

\_\_\_\_\_  
Signature.

Bombay, \_\_\_\_\_ 19\_\_\_\_

One month after date pay the bearer the sum of three thousand rupees.

XY

To

P.Q.  
(Address)

\_\_\_\_\_  
Signature.

Bombay, \_\_\_\_\_ 19

Six months after date pay A. B. or order the sum of rupees five thousand.

XY

\_\_\_\_\_  
Signature.

To

P.Q.

(Address)

In case of need with

The Bank of China Limited, BOMBAY.

**Form of Banker's Draft**

To

..... Bank Limited,

Date,

(Address of branch)

On demand pay X. Y. or order the sum of five thousand rupees and debit the same to our account.

Rs. 5,000 only.

Per Pro

..... Bank, Limited

(Address of branch)

Signature of Manager.  
\_\_\_\_\_**FORM OF ACCEPTANCE OF BILL OF EXCHANGE****General Acceptance**

Bombay, \_\_\_\_\_ 19

Three months after date pay to A. B. or bearer the sum of ten thousand rupees.

XY

\_\_\_\_\_  
Signature.

To

JOHNSON &amp; PHILIPS

Address.

JOHNSON &amp; PHILIPS

Bombay, \_\_\_\_\_ 19\_\_\_\_

Three months after date pay to A. B. or order, the sum of five thousand rupees for value received

XY

Signature.

To

JOHNSON &amp; PHILIPS

Address.

**Qualified, Particular or Special Acceptance**

Bombay, \_\_\_\_\_ 19\_\_\_\_

Three months after date pay to the Bearer the sum of four thousand rupees.

XY

Signature.

To

JOHNSON &amp; PHILIPS

Address.

**General Acceptance**

Bombay, \_\_\_\_\_ 19\_\_\_\_

Six months after date pay to A. B. or order the sum of ten thousand rupees.

XY

Signature.

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SORABJI BURJORJI

**Liability of Drawer [Sec. 30]**

The liability of a drawer of a bill of exchange is, until the bill is accepted by the drawee, primary liability; but after the bill is accepted by the drawee, the liability of the drawer becomes secondary liability, *i.e.*, the drawer is not liable unless and until the bill has been presented for payment to the drawee (acceptor) and payment has not been made and notice of dishonour has been given to the drawer. (*Miller v. National Bank of India*, 19 Cal. 146.) If due notice has been given to the drawer within the time prescribed under the Act, the drawer of bill of exchange or cheque is liable in case of dishonour by the drawee or the acceptor thereof, as the case may be; and the drawer must compensate the holder. (*Sheth v. Bhaca Bhai*, 3 Bom. 182.) So also in the case of a hundi. (*Jambhakar v. Prulhaddas*, 20 Bom. 133.)

When a bill of exchange has been dishonoured by non-acceptance by the drawee, the holder can give notice of dishonour and hold the drawer liable for the full amount of the bill; the holder need not wait till the maturity of the bill or need not present it to the drawee for payment. [Notice of dishonour is required to be given in the case of hundis also. *Motilal v. Moti Lal*, 6 All. 78.]

The drawer of a bill of exchange can exclude or limit his liability upon the bill by the use of such words as "without recourse to me," or "*sans recourse*," or "pay A or order at his own risk."

**Liability of Drawee of Cheque [Sec. 31]**

The drawee of a cheque, who is always a banker, is liable in damages to the drawer, if he, having sufficient funds of his customer, wrongfully refuses or fails to honour his customer's cheque. The relation between a banker and the customer of the bank is that of debtor and creditor. (*Off. Assignee, Madras v. Iyer*, 33 Mad. 134.) To make a person a customer of a bank, there must be some account of his with the bank. (*Lucave & Co. v. Credit Lyonnais*, 1897, 1 Q. B. 148.) A banker may by agreement allow the customer to overdraw to an agreed limit. (*Cumming v. Shand*, 1860, 29 L. J. Ex. 129.)

The relation between a banker and his customer being that of a debtor and creditor, the banker should not refuse, without proper cause or excuse, to honour his customer's cheques, as a dishonour of a cheque is a very serious thing, especially for a man of business. **But a banker can, and must, refuse to honour his customer's cheques under the following circumstances:—**

- (1) When there is anything irregular on the very face of the cheque, *e.g.*, it is ambiguous, or drawn with doubtful legality, or there appears on the cheque an alteration



or mutilation or erasure. If there is any alteration, it must be signed by the drawer. (*Emanuel v. Roberts* 1868, 9 B. & S. 121.)

- (2) In the case of a post-dated cheque, the banker can hold the cheque but must not pay till the actual date mentioned on the cheque. (*Morley v. Culvermel*, 7 M. & W. 174.) If a post-dated cheque is "marked good for payment" by the manager, the bank cannot be held liable even to a holder in due course. (*Bank of Baroda v. Punjab National Bank*, 71 I. A. 124.)
- (3) When the funds of a customer of the bank are subject to a lien of the bank over those funds, or when the banker has any right by way of set-off against those funds, the funds are not deemed to be properly applicable to the payment of the customer's cheques, and the banker can refuse payment.
- (4) If the funds in the hands of the banker are not sufficient to enable the banker to honour the cheque of the customer, the banker can refuse to honour the cheque. But when there is a contract between the banker and the customer, that the banker shall honour the customer's cheques even though the banker has not sufficient funds of the customer with him, a dishonour of a customer's cheque would render the banker liable to an action at law which the customer can bring against him for damages. (*Fleming v. Bank of New Zealand*, 1900, A. C. 577.)
- (5) The banker is not bound to make payment of the cheque drawn by the customer, who has funds with another branch of the bank. The cheque must be drawn upon the very branch in which he has an account. (*Bank of Australia v. Murray*, 1898, A. C. 698.)
- (6) When a cheque is **countermanded** it is the duty of the banker not to pay any money on that cheque. If the banker pays, in spite of the countermanding, the banker cannot debit the customer's account to that extent. (*Mowji Shamji v. The National Bank of India*, 25 Bom. 499.)
- (7) Notice of death of the customer of the bank terminates the right of the bank to honour a cheque drawn by the customer; any payment, however, made by the banker before the banker knew of the fact of the death is valid. (*In re Beaumont*, 1 Ch. 889.)

- (8) In the case of insolvency of the customer of the bank, the banker should refuse to pay his customer's cheque as all the property and assets of the insolvent (except exempted property) become vested in the official assignee or receiver. (*Mathew v. Sherwel*, 1810, 2 Taunt. 439.)
- (9) When a banker has been served with a garnishee order, *i.e.*, an order by a court of law, asking him not to pay or honour any cheques drawn by his customer, the banker is justified and is bound not to honour such cheques.

### Duties of the Customer of the Bank

The customer of the bank is under a duty to take proper care of his cheque-book and to see that he does not make room for forgery or dishonesty on his cheques by other persons. Thus when a person fills in a cheque drawn on his banker, he must take care to see that what he writes in words or figures is so written that no room is left for forgery. For example, A fills in a cheque for Rs. 50, leaving some space before the words "Fifty" and the figures "50," and some person who gets the cheque puts the word "five" before the words "fifty" and figure "5" before the figure "50," and obtains payment from the bank of Rs. 550, the customer would be estopped from saying that the cheque was drawn for Rs. 50 only. The reason for this is that there was negligence on the part of the customer. The customer **ought to have left no space** before the words and figures 50, but by leaving such space he made room for forgery, and therefore, failed, in his duty towards the bank, to take care.

### Liability of Banker

In the case of **cheques** the banker is not liable for forgery in the signature of the indorsers or even the payee of a cheque, because the banker is not supposed to have knowledge of those signatures. On the other hand, the banker does possess the specimen signature of his customer, and is therefore, liable for any forgery in the signature of his customer. Before honouring the cheque the banker must verify, and satisfy himself, that the signature purporting to be that of the drawer of the cheque is really that of the drawer. The banker can best see that by seeing the signature as a whole and comparing it with the specimen signature. Sometimes, however, the bankers go to the extent of seeing whether every letter in the signature is written with the same exactness as in the specimen signature. But it can be noted that forged signatures are always made to look exact and that the true test is not that of comparing every letter and seeing whether it is in accordance with the specimen, but rather looking at the signature **as a whole** and seeing whether it is similar to that of the specimen, and thus **whether it appears really like the specimen signature.**

**Protection afforded to Paying Bankers [Secs. 10, 85, 128]**

Under Sections 10 and 128 of the Negotiable Instruments Act, a paying banker who pays the money in due course is, subject to the provisions of Section 85 of the same Act, protected. Payment is said to be made in due course, when it is made according to the **apparent tenor** of the instrument **in good faith** and **without negligence** or grounds for suspicion. Sec. 128 applies to payment on crossed cheques.

Where a **bill** is accepted payable at a bank, the banker cannot debit the account of his customer to the amount paid by him on a forged indorsement. A holder claiming through a forged indorsement may be paid by the bank, which cannot, in turn, debit the amount (so paid to the holder) to the customer's account. The bank's only remedy is against the person to whom it paid the amount. (*Bank of England v. Vagliano Bros.*, 1891 A. C. 107.) But where a cheque payable to order purports to be indorsed by or on behalf of the payee, the drawee is discharged by payment in due course. So where a banker pays a cheque on which there is forgery of the indorsement of the original payee he stands protected. This applies also to indorsements other than those of the original payee. (*Jamnadas v. The Nagpur Central Bank Ltd.*, 50 Bom. 118.) See Sec. 85 of the Negotiable Instruments Act. Under section 85A, of the Act, where any draft, *i.e.* an order to pay money drawn by one office of a bank upon another office of the same bank, for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course.

**Protection afforded to Collecting Bankers [Secs. 131, 131A]**

Under section 131 of the Negotiable Instruments Act, a banker who has **in good faith and without any negligence** received payment (as a collecting banker) for a customer, of a cheque crossed generally, or specially to himself, shall not, if the title to the cheque turns out to be defective, incur any liability to the true owner of the cheque by reason only of having received such payment. A banker receives payment of a crossed cheque for a customer notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

Under Section 131A this provision is made applicable to bank drafts also, as if the drafts are cheques.

To afford protection to collecting bankers, the following conditions must be satisfied :—

- (1) The collecting banker must have **acted in good faith and without negligence** in collecting the money. (*Commissioners of Taxation v. English Scottish & Australian Bank*, 1920, A. C. 683.) If there was anything which ought to have aroused suspicion and set

the banker to inquiry, then the banker is guilty of negligence if he did not inquire. (*Robinson v. The Central Bank of India Ltd.*, 9 Rang 585). See also *Bapulal v. Nath Bank Ltd.*, 48 B. L. R. 393.

- (2) The collecting banker must have received payment for **a customer**, *i.e.*, a person having an account with the banker.
- (3) The collecting banker must have **acted only as a recipient** of the money on the crossed cheque, **and not as a holder himself**. (*Underwood Ltd. v. Barclays Bank*, 1914, 1 K. B. 799.)
- (4) The collecting banker must have **collected** money on a **crossed** cheque. The crossing must not have been made by the banker or his agent or servant or clerk, but **must have been made before the cheque got into the hands of the collecting banker**. (*Gordon v. London City & Midland Bank*, 1902, 1 K. B. 242.)

#### **Liability of a Promisor on a Promissory Note and that of the Acceptor of a Bill of Exchange [Sec. 32]**

**Unless there is a contract to the contrary**, the promisor in a promissory note and the acceptor before the maturity of the bill of exchange are bound to pay the amount, mentioned in the instrument, at maturity according to the apparent tenor of the note or acceptance respectively; and the acceptor of the bill of exchange at or after maturity has got to pay the amount of the instrument to the holder on demand. If such payment is not made the maker or acceptor is liable to compensate any party to the note or bill for any loss or damage suffered by him and caused by such default. (*Motishaw v. Mercantile Bank of India*, 41 Bom. 567.)

The liability of a promisor on a promissory note and of an acceptor on a bill of exchange can be regarded as **primary** liability, unless by contract to the contrary, they have become liable as sureties and not primarily. Thus by a contract, an acceptor of a bill of exchange may have become a surety, and the principal liability may have been agreed to be that of a drawer. (*Steele v. Mackinley*, 1880, 5 A. C. 754.)

#### **Who can accept a Negotiable Instrument? [Sec. 33]**

The Negotiable Instruments Act provides that no person except the drawee of a bill of exchange, or all or some of several drawees, or a person named thereon as a drawee in case of need, or an acceptor for honour, can bind himself by acceptance. [Sec. 33] As a rule a bill of exchange cannot be accepted by a stranger, *i.e.*, a person who is not a party to it; but there is an exception to this rule, and that is: **a stranger even can accept the bill if he accepts it for the honour of any**

party already liable on the bill. Such person is known as acceptor for honour.

A bill of exchange is addressed to N. Vasanji. M. Motabhai accepts it. Is he liable as acceptor? No, he is not liable, unless he accepted for honour of the drawer or some other party liable on the bill. None but the drawee can otherwise accept. Mr. M. Motabhai is not the drawee. So his acceptance cannot make him liable. (See also *In re New Fleming Spinning & Weaving Co. Ltd.*, 3 Bom. 439.)

A bill of exchange is addressed to Mr. Burjorji Jamshedji, Manager of the M. J. K. Co. Ltd. The Manager accepts it thus :  
 “Accepted”.

Burjorji Jamshedji  
 for and on behalf of the M.J.K. Co. Ltd.

What is the legal position arising out of this acceptance? The answer is that Mr. Burjorji Jamshedji is personally liable on the acceptance. The Company is, without more, not liable, **because the Company was not made the drawee**—the bill was addressed to the Manager and **not the Company**—and because under the Negotiable Instruments Act, excepting the case of an acceptor for honour who can be a stranger (an outsider—not liable on the bill) the acceptor must not be a stranger but must be the drawee. If the bill was not addressed to the Company, its Manager cannot accept it on its behalf. The Manager then is himself liable though he purported to accept on behalf of the Company. (See also *Hearld v. Connah*, 34 L. J. 885.)

#### Acceptance in case of Several Drawees [Sec. 34]

When there are several drawees of a bill of exchange (who are not partners), each of them can accept it for himself, but not for the other or other drawees except with consent or authority. In case, however, of drawees being partners, one of them can so accept as to bind the rest also, because a partner is deemed to be an agent of every other partner. But even with regard to partners, the power to draw, indorse, or accept or otherwise deal in negotiable instruments must, if the firm be a non-trading firm, be given by the partnership agreement. If the partnership agreement does not give power to deal in negotiable instruments, then a partner cannot so accept as to bind the rest of the partners, unless the firm is a trading firm. In the case of a trading firm the authority to draw, indorse, accept and negotiate bills of exchange, negotiable instruments cheques, hundis, is implied, and so a partner can accept so as to bind the rest of the partners.

#### Liability of Indorser [Secs. 35, 36]

**In the absence of a contract to the contrary, an indorser's liability is to pay on the instrument. Every prior party is liable to every subsequent party.** An indorser can exclude his liability by use of such words as “*sans recourse*”, or “without personal liability” or “myself not being liable”.

Where the holder of a negotiable instrument, without the consent of indorser, destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the extent as if the instrument had been paid at maturity. To have an illustration : X is the holder of a bill payable to Y or order. The bill has the indorsements : (1) "Y" (2) "P. Q." ; (3) "M. N." X., without the consent of M.N., strikes out the indorsement "P. Q." Can X now sue M. N.? No, he cannot sue M. N. because he destroyed M. N.'s right to sue P. Q. by striking out P. Q.'s signature. But he X can sue Y because Y's indorsement is prior to that of P. Q. and Y had no right against P. Q. the subsequent party. A prior party can sue only the party **prior to him**, and not any subsequent party.

**Maker, Drawer, and Acceptor are Principal Debtors, and the other Parties are liable as Guarantors [Sec. 37]**

A promisor in case of a promissory note, or a drawer in case of a cheque or a bill of exchange, is the principal debtor ; **after acceptance by the drawee, the acceptor becomes the principal debtor, unless there is a contract to the contrary.** The other parties to the instrument are liable as guarantors for the maker, drawer, or acceptor, as the case may be, subject to a contract to the contrary.

As between the parties liable as guarantors, each prior party is, in the absence of a contract to the contrary, also liable as a principal debtor in respect of each subsequent party. To have an illustration :—

A draws a bill payable to his order on B who accepts. A afterwards indorses the bill to C ; C to D ; and D to E. As between E and B, B is the principal debtor and A, C, D are sureties ; as between E and A, A is the principal debtor, and C, D are sureties ; as between E and C, C is the principal debtor, and D is his surety.

**Re : Suretyship [Sec. 39]**

The Negotiable Instruments Act provides that when the holder of an accepted bill of exchange enters into a contract with the acceptor which, under the Contract Act, would discharge the other parties from liability, the holder may nevertheless **expressly** reserve his right to hold the other parties liable, and in such a case the other parties are not discharged from liability. Under the Contract Act, when the creditor or the promisee gives the principal debtor a further time to pay, or enters into any new contract with the principal debtor, without the consent of the guarantor, the guarantor is discharged from liability ; but under the Negotiable Instruments Act, Section 39 provides an important deviation from the Contract Act. The holder of a bill of exchange which is accepted by the drawee and who is regarded as the creditor can give the acceptor who is the principal debtor a further time to pay or may release him from

liability, but at the same time he, the holder, can **expressly** reserve his right to proceed against the guarantors, i.e., the other parties liable on the instrument. But this section applies only when such contract is made **with an acceptor** and not with any other party, and it applies when there is **an express** reservation of his right by the holder to proceed against the other parties. When a party **other than the acceptor** is discharged, the holder **cannot** expressly reserve his right to hold the other parties liable; they all get discharged.

Where the acceptor gets discharged not by an act, but by operation of the law, *e.g.*, by reason of the acceptor becoming insolvent, the other parties do not automatically get discharged. They remain liable as sureties for the acceptor. (Re Jacob, 1875, L. R. 10 Ch. App. 211, 213.)

A, the holder of a bill of exchange for Rs. 1,000, asks from the acceptor Rs. 500 in full satisfaction of the bill. All other parties liable as guarantors are discharged from liability. But if the holder, while accepting Rs. 500 only from the acceptor, **expressly reserves** his right to proceed against the other parties, and makes them liable, he can do so under the Negotiable Instruments Act. But that does not give the holder any right to release from liability any of the indorsers or the drawer and at the same time have right against the other parties. For example, if the holder releases from liability one of the indorsers, he cannot even expressly reserve his right to proceed against the rest of the parties on the instrument.

### Accommodation Bills [Secs. 43, 59]

An accommodation bill is a bill in which a person lends or gives his name to oblige a friend or some person whom he knows or otherwise. The party lending his name to oblige the other party is known as **the accommodating or accommodation party** and the party so obliged is called the **party accommodated**. (Parr v. Jewell, 1855, 16 C. B. 684.) Often bills are drawn, accepted, and indorsed without any consideration, just with a view to obliging a friend. The obliger who so draws, accepts and indorses is called the accommodation party. An accommodation party is not liable on the instrument to the party accommodated because as between them, there was no consideration and the instrument was merely given to help or oblige the party accommodated. But an accommodation party is liable to a holder for value, who takes the accommodation bill **for value, though such holder may not be a holder in due course**. The holder for value, taking accommodation bill may have taken it with full knowledge of the fact of the party concerned being an accommodation party; he is nevertheless entitled to receive the full value from such accommodation party. (Mills v. Barber, 1836, 1 M. & W. 425.) The accommodation party in turn can claim compensation from the accommodated party for the amount the accommodation party had to pay to the holder for value.

### Indorsement of Negotiable Instrument

An indorsement is called '**general indorsement**' (**indorsement in blank**) when the indorser does not write the name of the transferee above his signature. The indorser simply signs and delivers the instrument. [Sec. 16 (1)]

The effect of an indorsement in blank is to convert an instrument payable to order into one payable to bearer, so that the transferee in blank can negotiate it by mere delivery. The transferee can write above the signature of the transferor (indorser) the name of any other person to whom the instrument is sought to be transferred. Thus if A. X. Y. indorsed an instrument in blank and delivered it to P. Q., the latter (*i.e.* P. Q.) can write above the signature of the indorser (A. X. Y.) the name of M. N. a third party to whom the instrument is now transferred by P. Q. In such a case P. Q. is not liable to M. N. because P. Q.'s name is not on the bill. Thus P. Q. can avoid personal liability on the bill. [Sec. 49]

An indorsement is said to be **special** or **particular** or **in full** when the name of the indorsee is written above the signature of the indorser. Thus an indorsement: "Pay A" and signed by X, makes A the holder, and A cannot transfer the instrument without putting his signature on the instrument. Both signature and delivery are required for negotiation or transfer.

The effect of an indorsement in full is to make an instrument otherwise payable to bearer now one payable to order. The moment it is indorsed in full, it ceases to be a bearer instrument, and becomes an instrument payable to order as against the indorser in full and all parties **subsequent** to the party who indorsed it in full; but it should be remembered that the instrument still **remains a bearer instrument** so far as parties **prior** to the indorser in full are concerned. Against all parties prior to the indorser in full, it remains a bearer instrument, with the result that even if a person took it by mere delivery **without** any indorsement from a holder who had held it as an order instrument (by reason of the indorsement in full), such person can sue on the instrument the parties **prior** to the person who indorsed it in full. But he cannot sue the indorser in full or any party **subsequent** to the indorser in full. (See *Walker v. Macdonald*, 1848, 2 Ex. 527.) [Sec. 55]

A is the payee and the first holder of a bill of exchange. He indorses it in blank and delivers it to X. The instrument now becomes, in the hands of X, a bearer instrument and X can therefore deliver it to Y, without any indorsement. Say, X does so, *i.e.*, delivers it, without any indorsement, to Y. But Y now indorses it **in full** to Q. In the hands of Q, the bill becomes payable to order, so that Q cannot by mere delivery pass it over to T or S or F so as to be himself liable to such party. Say, Q delivers it, without any indorsement, to M. Does M get a title, and, if so, against whom? M gets no title against Q. He cannot sue Q, because Q had not



indorsed it to him. Can M sue Y who indorsed it in full. No, he cannot sue Y because Y indorsed it in full, and as against him it is an order instrument because of the indorsement in full. But M can sue the parties **prior** to the indorser in full, *i.e.* parties prior to Y. He (M) can sue X, A.

An indorser (the person who signs and delivers a negotiable instrument) is liable thereon (by virtue of his indorsement) to all parties who come **after him**, unless he indorsed *sans recourse*. He, in turn, can make the parties, prior to him, liable to him; but he cannot sue subsequent parties. The rule is: every subsequent party can sue every prior party, or a prior party is liable to subsequent parties, unless there is what is known as **'taking the bill back'** and consequent **'circuitry of action'**. [Sees. 50, 52]

If a prior party, who had parted with the instrument, takes it back, *i.e.*, becomes a party once again to the instrument, he can by virtue of the subsequent taking of the instrument demand money from the prior parties, but he **cannot sue** them. This is so, because if he were allowed to sue prior parties **who come after his original position** on the instrument, then such prior parties can sue him also on the strength of his prior or original indorsement or position, he having stood there **before they came up**. So the suit of the person who took the instrument back would be met by a countersuit of the defendant against him because the defendant can in turn catch the plaintiff on his prior indorsement. The suit of the one against the other is nullified, counteracted or neutralized by the suit of that other in turn against him, unless the original indorsement of the plaintiff **was** *sans recourse* *i.e.*, the plaintiff had excluded recourse to him, had thrown out personal liability.

An indorser can exclude his liability by putting, after his signature, words to the effect that he is not undertaking any personal liability—words such as “*sans recourse à moi*,” or “*sans recourse*,” or “without personal liability.” [Sees. 50, 52]

An indorsement is said to be **restrictive**, when the further negotiability of the bill is taken away—negotiation is prohibited— or where the endorsement simply seeks to transfer the instrument for a specific purpose only, *i.e.*, without actually transferring the right, title and interest to the transferee, making, for example, the transferee an agent for collection or to hold the money on behalf of the transferor or on account of some other person. Thus an indorsement: “**Pay X only**” is restrictive, because the further negotiability of the instrument is taken away by the use of the word “**only**.” An indorsement: “**Pay X for my own use**” is restrictive; so also: “**Pay X on account of Y**” is restrictive; because it is for a specific purpose only. [Sec. 50]

A negotiable instrument cannot be indorsed for any amount less than that mentioned on the instrument, **unless a portion of the**

**amount has already been paid, and a note to that effect is made on the instrument.** Thus if an instrument is for Rs. 1,000, a person cannot indorse it to another person for Rs. 500 only ; but if a sum of Rs. 500 on the instrument has already been paid, then he can indorse the instrument for the remaining Rs. 500, provided a note to the effect that Rs. 500 had already been paid on the instrument is mentioned on the instrument.

### **Holder's Right to Duplicate of Lost Bill of Exchange [Sec. 45A]**

The Negotiable Instruments Act provides that where a bill of exchange has been lost **before it is overdue**, the holder of it at that time may apply **to the drawer** requesting the drawer to give another bill of the same tenor. When such demand is made by the holder who has lost his bill, calling upon the drawer to give a duplicate of the lost bill, the drawer is bound to give a duplicate, provided, however, that the drawer can ask the holder to provide reasonable security to the drawer to indemnify him (the drawer) against all persons if the bill alleged to have been lost is found again. The holder **must be prepared to give reasonable indemnity** to the drawer if the drawer demands it. (*Indur Dugar v. Lachmi Bibee*, 15 W. R. 501.) If the holder is so prepared to give such indemnity the drawer must give a duplicate to the holder. If the drawer does not give such duplicate to the holder, the holder may sue the drawer and the Court would order the giving of the duplicate. The holder has also the right to sue the drawer who refuses to give a duplicate, in an action for damages as an alternative to the claim for damages : (*King v. Zimmerman*, 1871, L. R. 6 C. P. 466.)

In the case of a promissory note lost, there is **no** right possessed by the holder to ask for a duplicate. This right extends **only to bills of exchange and not to promissory notes**. Even with regard to bills of exchange this right to ask for duplicate can be exercised if the bill has been lost **before it became overdue**. A bill is said to be overdue after the day of maturity has passed. There is no right to ask for a duplicate of a lost bill after it became overdue or after maturity. Further it must be noted that the remedy which the holder of a lost bill has against the drawer to ask for duplicate applies against the **drawer alone** and not any other party. A party other than the drawer cannot be called upon to give a duplicate.

### **Rights and Liabilities of the Owner of a Lost Bill or Note**

(1) The owner who has lost his bill or note can claim it from the finder of the same, if it is found. The finder can not acquire any title to or rights on the instrument ; he is bound to hand it over to the true owner who is entitled to claim and recover it from the finder. (*Lowell v. Martin*, 1813, 4 Taunt. 799.)

(2) If the finder has found the instrument which is payable to order (and not to bearer), so that its valid transfer requires an indorsement and delivery by the holder, and if the finder forges the signature of the holder and delivers the instrument even to an innocent holder for value in due course, such holder cannot get any title against the true owner, because a forgery is a nullity and cannot be relied upon as a source of passage of title. The payer who has paid the finder **on the forged indorsement** is not absolved from liability to pay the true owner the money due payable on the instrument.

(3) If the finder of the lost instrument, which is payable to bearer, or which has been converted into one payable to bearer by reason of an indorsement in blank, has delivered it to a holder in due course, the latter gets good title to it, because it is **delivery** that is **enough** to pass title in the case of such an instrument. The holder in due course can keep it even against the true original owner who had lost the instrument. The holder in due course can demand the money payable on the instrument, and all who are liable to pay on the instrument are liable to pay to the holder in due course.

(4) If the instrument lost is a bill of exchange, the holder can apply for a duplicate from the drawer (though not from any other party), if it was lost **before it became overdue**, and provided the holder is ready and willing to give security to the drawer if the drawer so demands.

(5) The payer who pays the finder of the lost bill, honestly and without any negligence believing him to be the true owner **and paying in due course**, *i.e.*, according to the tenor of the instrument and at or after maturity (but not before maturity), will be discharged from liability on the instrument. The true owner can, in such case, recover the money from the finder. (*Burne v. Morris*, 1834, 2 Cr. & M. 579.)

(6) It is the duty of the holder who has lost his bill to give due notice to the drawee for payment at the time the instrument becomes due for payment, and, in case of dishonour by the drawee, to give notice of dishonour to all the parties liable on the instrument.

(7) It is of the utmost importance and desirability that the holder of the lost instrument should give public notice of the loss in the principal newspapers in the locality, and even elsewhere, so as to prevent forgery or fraud; and individual notice should also be given to the parties liable on the instrument; so that they may be on the guard.

#### Negotiation [Secs. 14; 47; 48]

A negotiable instrument can be negotiated **by indorsement and delivery, if it is payable to order; or by mere delivery without any**

**indorsement if it is payable to bearer.** Delivery is essential for negotiation. Without delivery the instrument is said to be escrow or in abeyance. Delivery may be actual or constructive.

### **Negotiation Back—"Taking up" of a Bill—"Circuity of action"**

Where a person who has been a party to a negotiable instrument, takes it again, the instrument is said to be negotiated back to him and he is said to have taken up or taken back that negotiable instrument. We have noted that every prior party is liable to every subsequent party. Now by reason of the prior party having taken back the instrument, subsequently he becomes a subsequent party also, and he can demand money from a party prior to him ; but that prior party can in turn sue him, by virtue of the prior indorsement of the plaintiff ; so this would involve a circuity of action. It is for this reason that the law provides that when a prior party takes back a negotiable instrument, he cannot sue such parties, as are prior to him by virtue of his subsequent taking up of the instrument but are **subsequent** to his **original** indorsement or position on the instrument, unless he in his prior indorsement had excluded personal liability by the use of words such as "*sans recourse*." The indorsement on a negotiable instrument are as follows :—

P  
A  
B  
X  
Y  
A

A is a person who was a **prior** party. He negotiated the instrument to B, B to X, X to Y, and Y again to this very A. Now A by reason of this last indorsement has got the right to claim money from Y, X or B ; but can A sue X, Y or B.? Supposing A is allowed, at law, to sue Y, X or B, then Y, X or B can, in turn, sue A **by reason of A's prior indorsement**. This would bring about suing in a vicious circle. There would be what is known as "**circuity of action**". It is for this reason that A who takes back the negotiable instrument cannot sue the prior party Y, X or B. But A can sue P, because P is prior even to A's original indorsement. Again, it must be borne in mind that in the very illustration, there could be no circuity of action, and A could sue Y, X or B if A in his original indorsement had signed "*sans recourse*"; say, if the indorsements were as follows :—

P  
A (*sans recourse*)  
B  
X  
Y  
A

### Holder Deriving Title from Holder in Due Course [Sec. 53]

A person who gets his title from a holder in due course, who has a good title, gets a perfectly good title to the negotiable instrument **because he derives his title from that of the holder in due course.** Even if such person who derives his title from a holder in due course knows everything about the defect in title of any prior indorser or holder, he will, nevertheless, get a perfectly good title to the instrument because the source of his title is the title of the holder in due course. (Sec. 53 of the Negotiable Instruments Act). A bill has been originally obtained by fraud from the drawer. It goes into the hands of X, a holder in due course. X indorses the instrument to Y. Y is not a holder in due course because he knows of the previous fraud; nevertheless Y gets a good title to the instrument because Y's title is derived from X's title, and X being a holder in due course having a good title, confers also a good title in favour of Y. But if Y was a party to the original fraud, Y could not get a good title (*Kredit Bank v. Schenkers*, 1927, W. N. 39) See also 10 Bom. L. R. 268.

### Rights and Privileges of Holders in Due Course

1. The holder in due course gets a good title (free from equities and without any defect), though the person from whom he took the negotiable instrument might not have himself possessed a good title, unless he took the instrument under a forged indorsement in case of an instrument payable to order, which for the passage of title required an **unforged indorsement and delivery**—a forgery being a nullity. (*Mascarenhas v. Mercantile Bank of India*, 34 B. L. R. 1; *Mercantile Bank v. D'Silva*, 30 Bom. L. R. 1225.)

2. The holder in due course, who takes a negotiable instrument made as such (by the transferor to him) from a bare inchoate stamped instrument signed by the maker and stolen from his (the maker's) possession before he could deliver it to the person to whom it was intended to be delivered, does not get a good title to the instrument, because the instrument, when it was inchoate, had **not been delivered** by its maker to anybody; it was a thief who had taken it from the possession of the maker and made it complete as a bearer instrument and transferred it away to the holder in due course. (*Baxendale v. Bennett*, 1878, 3 Q. B. D. 525.)

3. The holder in due course who takes a negotiable instrument, which was originally an inchoate stamped instrument signed by the maker of it who had delivered it to another person with instructions to abstain from filling it in for the full amount allowed or covered by the stamp on it and to fill it in for **a lower amount only** (say, five hundred rupees only), gets a good title to the **full amount** for which the instrument has actually been filled in by the original donee (who made it choate), provided the same is **covered by the stamp** and not merely to the amount actually permitted. Thus if A gives

B a stamped paper with his signature thereon with instructions to B to abstain from filling it in for any amount exceeding Rs. 500, and B wrongfully fills it in for Rs. 1,000 (covered by the stamp), B cannot sue A for Rs. 1,000. But if B has transferred the instrument to X, a holder in due course, X has a good title for the full amount of Rs. 1,000, and not merely Rs. 500. (Lloyd's Bank v. Cooke, 1907, 1 K. B. 794.)

4. When a bill of exchange is drawn in a fictitious name and is payable to the order of the drawer, and is indorsed by **the same hand as the drawer's signature**, the holder in due course stands protected and the acceptor cannot plead as against the holder in due course that such name was fictitious. (Cooper v. Mayer, 1820, 10 B. & C. 468.)

5. A holder in due course to whom a bill or a note is negotiated, gets a good title on it even as against such parties as plead that the delivery of the instrument was for a specific purpose only.

6. A holder in due course gets a good title even to an instrument obtained by fraud or by an offence or even though the instrument was stolen or taken after it had been lost by the owner, provided he (the holder in due course) does not take the instrument (if payable to order) under a forged indorsement, for a forgery is a nullity and cannot be source of transfer of title, and provided the instrument is not vitiated by such fraud as causes a complete lack of consent *ab initio*, e.g., in Foster v. Mackinnon, (1869, L. R. 4 C. P. 704; Chimanram v. Diwanchand, 56 Bom. 180), where the signature of an old gentleman was taken (as drawer) on a bill of exchange whereas he was told that it was only a guarantee that he was signing—the principle '*non est factum*,' i.e., 'this is not my act,' being applicable. (Chichester v. Hill, 1882, 52 L. J. Q. B. 160); Mascarenhas v. Mercantile Bank of India, 34 B. L. R. 1; Mercantile Bank v. D'Silva, 30 Bom. L. R. 1225.)

7. No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer, shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn. [This, however, **does not preclude a minor** from denying the validity of a note on the ground that he was a minor at the date of the note. (Chengal Chetty v. Nainappa, 117 I. C. 133.)

8. No maker of a promissory note and no acceptor of a bill of exchange payable to order shall, in a suit thereon by a holder in due course, be permitted to deny the capacity of the payee, at the date of the note or bill, to indorse the same. (Jones v. Darch, 1817, 4 Price 300; Smith v. Marsack 1848, 6 C. B. 486). But it can be shown that the payee was only a benamidar. (Reddiar v. Akkal, 58 Mad. 693.)

### Negotiation by Legal Representatives [Sec. 57]

The legal representative, representing the estate of a deceased person, cannot negotiate **by delivery only** a promissory note, bill of exchange or cheque payable to order and indorsed by the deceased who could not deliver it because of his death. What is required to negotiate an instrument signed by the deceased but not delivered by the deceased **is an indorsement by the legal representative himself**. The legal representative must **re-indorse the instrument and deliver** it to the person for whom it was intended to be delivered, and thereby he can communicate the title in the instrument to the person to whom it was intended by the deceased. (*Bromage v. Lloyd*, 1847, 1 Ex. 32). But the legal representative while re-indorsing the instrument **should take care to exclude his own liability** on the instrument by using words to the effect that he has excluded his own liability.

### The Effect of Fraud/Forgery on a Negotiable Instrument [Sec. 58]

The effect of fraud on a negotiable instrument is that if the fraud does not amount to forgery, a holder in due course taking a negotiable instrument gets a better title than what the transferor had. If A has taken an instrument by fraud, coercion, undue influence, or by theft from another person and has transferred it to a holder in due course, the latter can claim a good title to the instrument, provided he has not taken under a forged instrument. (*Mascarenhas v. Mercantile Bank of India*, 34 B. L. R. 1; *Mercantile Bank v. D'Silva*, 30 Bom. L. R. 1225.)

Where the fraud involves an act of forgery of an indorsement, the effect of such forgery would be that if the instrument is payable to order it would not be capable of giving any title whatsoever even to a holder in due course, **because forgery is a nullity and is not a source of communication of title**. (*Mercantile Bank v. D'Silva*, 30 Bom. L. R. 1225.) In the case, however, of an instrument payable to bearer, an indorsement is not at all necessary to communicate title, and therefore, if there be a redundant forgery of the last holder's signature, a holder in due course would nevertheless get a good title to the instrument. A has indorsed an instrument in favour of B or order and the instrument is kept in A's drawer. X a thief steals it from A's drawer, and indorsing the signature of B, transfers it away to one P, a bona fide transferee for value (being a holder in due course). P will get no title to this instrument because B's signature has been forged by the thief, and the instrument was payable to order. An instrument payable to order can only be negotiated by indorsement and delivery. Indorsement is an essential source of communication of title to the indorsee. Now if there be a forgery in the indorsement it goes without saying that even the holder in due course cannot get any title to the instrument because the thief has no title whatever. *Nemo dat qui non habet*, i.e. no one can give or transfer, who possesses it not himself.

In the case, on the other hand, of an instrument payable to bearer, all that is required for communication or transfer of title is a delivery. No indorsement is required. If therefore a thief steals an instrument payable to bearer and transfers it to a holder in due course, the latter would get a good title to the instrument because he takes it not through any indorsement but through the delivery. Even though the thief thinking that the indorsement was essential, forges the signature of the holder, the holder in due course to whom it is then negotiated would get a good title, because we are not concerned with the signature, we are only concerned with the delivery of the instrument.

When the fraud is of such type that it **vitiates consent** *ab initio*, so that consent is wholly lacking, the instrument is void *ab initio*, and if negotiated even to a holder in due course, he would not get any title on it (*Foster v. Mackinnon*, 1869, L. R. 4 C. P. 704; *Chimanram v. Diwanchand*, 56 Bom. 180). Thus where the signature of an old gentleman was taken on what was represented to him to be a guarantee, whereas it was really a bill of exchange it was held that even a holder in due course could get no title on the instrument because the old gentleman had never consented to sign a bill; he thought it was a guarantee which he had signed. "*Non est factum*" could be his plea. (*Foster v. Mackinnon*, 1869, L. R. 4 C. P. 704).

When the holder of a negotiable instrument acquires the instrument after its dishonour, with notice of such dishonour, or after maturity, he has, as against the other parties, the rights of his transferor, and no more than those rights; but any person who in good faith and for value becomes the holder, after maturity, of a promissory note or bill of exchange made, drawn, or accepted without consideration, for the purpose of accommodating or obliging some party to the bill or note, can recover the amount of the note or bill from any prior party.

An acceptor of a bill already indorsed is not excused from liability by reason of such indorsement being forged, if he knew or had reason to believe the indorsement to be forged when he accepted the bill.

### Presentment for Acceptance [Secs. 61, 62]

Some bills require to be presented for acceptance. A bill of exchange payable **after sight** must, if no time or place is specified thereon for presentment, be presented to the drawee thereof for acceptance, if he can, after reasonable search, be found, by the person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a business-day. A bill of exchange which is **expressly required** to be presented for acceptance must be presented for acceptance before it is presented for payment.



In the case of a bill payable **after sight** presentment for acceptance is necessary **in order that the maturity of the instrument, i.e. time for payment**, may be determined; and where a bill is expressly required to be presented for acceptance it must be presented for acceptance even though it is payable at sight or a certain number of days after date or on demand, because express contract does so require. In other cases, however, in the absence of a contract to the contrary on the instrument, presentment for acceptance is not required. Though a bill may not be required, at law, to be presented for acceptance, yet good business policy would demand such presentment, because when an instrument is presented for acceptance, the holder thereof can know whether the drawee will accept liability on it or whether he would disown all liability on it. But where acceptance is required under the law, the bill **must** be presented for acceptance; otherwise no party to the instrument remains liable on the instrument to the person making the default. (Savard v. Palmer, 1818, 8 Taunt. 277.)

When the drawee of a bill cannot, though a reasonable search has been made, be found, the bill can be treated as dishonoured.

If a bill is directed to the drawee at a particular place, it must be presented at that place; and if at the date of presentment, he cannot, after reasonable search, be found the bill can be treated as dishonoured.

The presentment for acceptance must be made to the drawee or to his authorised agent. (Cheek v. Roper, 1804, 5 Esp. 175)

When authorised by the usage or agreement, a presentment through the post office by a registered letter is sufficient.

### **When is Presentment for Acceptance Excused**

Presentment for acceptance is excused in the following cases:—

- (1) Where the drawee is a non-existing person or fictitious person or one incapable of contracting, *e.g.* a minor or a lunatic. [Sec. 91]
- (2) When the drawee is insolvent or is a deceased person. [Sec. 75]
- (3) When after a reasonable search the drawee cannot be found; [Sec. 61]
- (4) When acceptance has been refused on some other ground though presentment was irregular.

### **Effect of Failure to Present for Acceptance**

If a bill **requiring presentment for acceptance**, is **not so presented** by the holder to the drawee or his duly authorised agent, **he drawer**

**and all the indorsers are discharged** from liability to the holder; no action can lie even in respect of the debt or the consideration in respect of which the bill was passed. (*Soward v. Palmer*, 1818, 8 Taunt. 277.)

### **Drawee's Time for Deliberation [Sec. 63]**

A drawee is **entitled to have forty-eight hours (exclusive of public holidays and Sundays) for deliberating whether he will accept the bill or not.** (*Bank of Dieman's Land v. Victoria Bank*, 1871, 3 P. C. 526.) At the expiration of the 48 hours, it is the duty of the drawee to return the bill, either accepted or not accepted. (*Bank of Dieman's Land v. Victoria Bank*, 1871, 3 P. C. 526.) It is the **duty of the holder to demand the re-delivery** of the bill as soon as the 48 hours get over, and if the drawee does not return the bill, the holder can sue the drawee for return of the bill or for damages. If, however, through the negligence of the holder, the drawee returns the bill to a wrong person, the drawee is not liable or responsible to the holder in damages or otherwise. (*Morrison v. Bachanan*, 1833, 6 C. & P. 18.)

### **Acceptor of Bill Drawn in Fictitious Name [Sec. 42] Fictitious Bills**

In *Cooper v. Meyer* (1820, 10 B. & C. 468), it has been laid down that when a bill is drawn in a fictitious name and is payable to the drawer or his order, the acceptor undertakes to pay to the person who signed as the drawer or to his order. An indorsee may prove that the signature of the drawer and on the first indorsement are in the same handwriting.

A bill of exchange is said to be "drawn in a fictitious name and payable to the order of the drawer" when both the drawer and the payee are fictitious persons. A payee is called "**a fictitious payee**" when the name of the payee is inserted as a sham, *i.e.*, without any intention of payment, or when the payee is a non-existing person. (*Bank of England v. Vagliano Bros.*, 1891, A. C. 107.)

Where both the payee and drawer are fictitious persons, the acceptor is liable to the holder in due course, if the holder in due course can prove that the first indorsement and the signature of the supposed drawer are in the same handwriting; but the acceptor cannot be held liable to a person who knew or believed or had reason to believe that the drawer or the payee was a fictitious person.

### **Presentment for Payment [Secs. 64-74]**

Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof, as the case may be, by or on behalf of the holder (Sec. 64.) Presentment for payment must be made during usual hours of business, and,

if on bankers, within banking hours. (Sec. 65.) A promissory note or bill of exchange payable after a specified period, after date or sight thereof, must be presented for payment on maturity (Sec. 66.) A promissory note payable by instalments must be presented for payment on the third day after the date fixed for the payment of each instalment (Sec. 67). A promissory note, bill of exchange or cheque made, drawn or accepted payable at a specified place, *i.e.* at a **particular place** (*Dorabji v. Jamshedji*, 38 B. L. R. 395), **and not elsewhere**, must, in order to make liable any party thereto be presented for payment **at that place, and not elsewhere** (Sec. 68.) A promissory note or bill of exchange made, drawn or accepted payable at a specified place, must, to hold the maker or holder liable, be presented for payment at that place (Sec. 69.) If the maker, drawee or acceptor of a negotiable instrument has no known place of business or fixed residence, and no place is mentioned in the instrument for presentment for acceptance or payment, such presentment may be made to him in person wherever he can be found (Sec. 71). A presentment to a party in person even on the street or in any other place where he can be found is valid (*Cross v. Smith*, 1813, 1 M. & S. 545), if the person concerned has no known place of business or fixed residence and no place is specified in the instrument for presentment for acceptance or payment. Where authorised by agreement or usage a presentment through the post office by means of a registered letter is sufficient.

Where a promissory note is payable on demand but not at a specified place, no presentment is required to make the maker thereof liable.

A cheque must, in order to hold the drawee liable, be **presented at the bank upon which it is drawn before the relation between the drawer and the banker has been altered to the prejudice of the drawer** (Sec. 72). If a cheque is not presented within a reasonable time and in consequence the drawer suffers damage, the drawer is discharged **to the extent of damage suffered by him**. A cheque must, to hold persons other than the drawer liable thereon, be presented within reasonable time after delivery thereof by such person. (Sec. 73.) A cheque which is intended, as a rule, for immediate payment and not for circulation, must be presented without any reasonable delay.

When a bill is accepted payable at a specified bank, and has been presented there but dishonoured, and if the banker negligently or improperly keeps or deals with or redelivers it, so as to cause loss or damage to the holder, he must compensate the holder for such loss or damage.

A negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder (Sec. 74.) In determining what is a reasonable time for

presentment for payment, for giving notice of dishonour, for noting or for protesting negotiable instruments, regard must be attached to the nature of the transaction, the instrument, the usage and the course of dealing with respect to similar instruments in the locality. In calculating reasonable time, public holidays and Sundays are to be excluded.

### **Effect of Non-presentment for Payment [Sec. 64]**

If default is made in presenting, within a reasonable time, a promissory note, bill of exchange, or cheque, for payment, the indorsers get immune from liability, but the maker and acceptor remain liable. (Walton v. Mascall, 1844, 13 M. & W. 452.) Presentment through the Post Office would be sufficient, where usage or custom of trade allows such presentment. (Sec. 64.)

### **When is Presentment for Payment Excused [Section 75A and Sec. 76]**

In the case of promissory notes payable on demand and not stipulated to be payable at a specified place, it is not necessary to present it for payment to charge or hold liable the maker thereof. (People's Instalment & Savings Bank Ltd. v. Nath, 1933, A. I. R. Lah. 133.) Presentment for payment is excused, and the instrument is deemed to be dishonoured at the due date for presentment in any of the following cases :—

- (1) If the maker, acceptor or drawee intentionally prevents the presentment of the instrument ; or if the instrument, being payable at the place of his business, he closes such place on a business day during the usual business hours ; or if the instrument being payable at some other specified place, no one authorised to pay it attends at such place during usual business hours or if the instrument not being payable at any specified place, the maker drawee or acceptor, as the case may be, cannot, after due search and diligence, be found ; [as to what due diligence is, is a question of fact (Hardy v. Woodroffe, 1818, 2 Stark, 319)] ;
- (2) As against any party sought to be held liable, if the maker or drawee or acceptor has undertaken to pay on the instrument in spite of the non-presentment of it ; or,
- (3) As against any party to the instrument, if, after maturity, with knowledge of the fact that the instrument has not been presented to the maker, drawee or acceptor, as the case may be, he makes a part payment on account of the amount due on the instrument, or promises to pay the amount due on the instrument in whole or in part, or otherwise abandons his right to take advantage of any default in presentment for payment ; or

- (4) As against the drawer, if the drawer could not suffer damage by reason of the want of such presentment for payment ; (Wirth v. Austin, 1875, 10 L. R. C. P. 689.) ;
- (5) If the place of presentment is a riot area. (Sec. 75A.)

### Effect of Absence or Failure of Consideration in a Negotiable Instrument [Secs. 43-45]

Though a negotiable instrument is presumed to have been drawn, made, accepted, indorsed or transferred for consideration, yet a party to it can prove that there was complete or partial failure of consideration. In case of **complete** failure of consideration, the liability can be **wholly** avoided ; where there is **partial** failure of consideration, liability can be avoided to the extent of such failure. But where any party taking the instrument without consideration has transferred it, with or without an indorsement, to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for value or from any party prior to such transferor for consideration. [Section 43 of the Negotiable Instruments Act.] X draws a bill on Y. Y accepts it without consideration. C gets this bill without consideration. C then transfers it to D for consideration. D can sue C, Y and X—all the parties **because he took** it for consideration. But C cannot sue on the instrument because C took it without value.

A is the holder of a bill. He transfers it to X without consideration. X transfers it to Y for consideration. Y transfers it without consideration to P. Can P recover? If so, from whom? P can recover from A, X, but not from Y, because as between Y and P there was no consideration.

Where a part of the consideration for which a person signed a promissory note, bill of exchange or cheque, though not consisting of money, is **ascertainable in money without collateral enquiry**, and there has been a failure of that part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced [See section 45 of the Negotiable Instruments Act]. When the consideration in a bill, promissory note or cheque is not money, but is other than money, *e.g.*, supply of some goods, and there is a partial failure of that consideration, the liability on the instrument is reduced by the extent of the value (in terms of money) of the consideration which so failed, provided it is possible, **without any collateral inquiry**, to determine that value. But where it becomes necessary to make a collateral inquiry to determine whether consideration has really, partially failed, and, if so, the extent to which it has failed, the amount payable on the instrument must be paid up in full ; and a separate suit for damages may be brought

to have the matter determined. The rights of a holder for value remain unaffected, even though the transferor from whom he took the instrument, or an earlier party, had not given full consideration and could not have himself sued for the full amount.

A bill of exchange is accepted by X for Rs. 1,000, the **agreed** price of **two** bales of cotton. Y supplies to X one bale. As there is a partial failure of consideration which can easily be ascertained in terms of money, without a collateral inquiry, (it being Rs. 500), X is liable to Y to the extent of Rs. 500 only, and not Rs. 1,000 though he accepted the bill for Rs. 1,000. (*Agra and Masterman Bank v. Leighton*, 1866, 2 Ex. 56.) Rs. 1,000 was the **agreed** price for **two** bales of cotton; but only **one** bale was actually delivered. Now as the bales were of the **same quality** and as the price was **fixed** at Rs. 1,000 for 2 bales, it follows that the price of one bale could not be more than Rs. 500. So X is liable to the extent of Rs. 500 and not Rs. 1,000.

Now supposing, in the abovementioned case, both the bales had been properly delivered, but X, the buyer (acceptor) refused to take the bales, on the ground that the cotton contained therein was of an inferior and not the agreed quality—that it was worth not more than Rs. 600. Could X then have offered to pay Rs. 600 only (on the bill he had accepted for Rs. 1,000)? No; because, without a collateral inquiry it could not have been ascertained whether the cotton was of inferior or agreed quality. X then would have been held liable to pay the whole amount of the bill, *i.e.*, Rs. 1,000; and his proper remedy would have been to sue Y separately for damages.

If the consideration for which a person signed a promissory note, bill of exchange or cheque, consisted of money, and was originally lacking partially or subsequently failed in part the sum which a holder in immediate relation with such signer is entitled to receive from him is proportionately reduced. The holder of a bill stands in immediate relation with the acceptor. The maker of a promissory note, the drawer of a bill or cheque stands in immediate relation with the payee; and so the indorser with the indorsee. Other signers may by agreement stand in immediate relation with a holder. [Sec. 44.]

X draws a bill on Y for Rs. 500 payable to X. Y accepts it, but subsequently refuses to pay. In a suit by X against Y, it is found that the bill was an accommodation bill to the extent of Rs. 100. X could recover Rs. 400 only, and not the amount of accommodation. (*Darnell v. Williams*, 1817, 2 Stark. 166.)

**PAYMENT OF NEGOTIABLE INSTRUMENTS [SEC. 78]**

*Payment of money on a negotiable instrument must be made to the holder or to his duly authorised agent. Unless the holder treats the payment to any other person as payment to himself, such payment will not discharge the person who pays. (Field v. Carr, 1828, 5 Bing. 13.)*

Payment should not be made till the maturity of the instrument ; a payment made before maturity is not a payment in due course, and the payer is liable to pay the whole amount again to the rightful holder. (Burbridge v. Manners, 1812, 3 Camp. 193.)

Payment should be in money, *i.e.*, currency notes, coins and other legal tender. Of course, **with the consent of the holder**, payment may be made in some other manner, and such payment shall be valid. He may be given a fresh bill, *i.e.*, a **re-draft** cancelling the original bill. (Sibree v. Tripp. 1846, 15 M. W. 23.)

**Interest on Negotiable Instruments [Secs. 79-80]**

When interest is specified expressly on a promissory note or bill of exchange, it shall be calculated at the specified rate, on the amount of the principal money due on the instrument, from the date of the instrument, until the payment or realisation of such amount, or until such date after the filing of the suit as the Court may direct.

Under the Usurious Loans Act, Courts of law have got the power to curtail the rate of interest when it appears to be unreasonably high. In the case of a suit brought by a creditor for recovery of loan of money or for enforcement of any security in respect of a loan, if the Court finds that the interest is exorbitant and that the transactions between the parties is substantially or materially unconscionable the Court may reconsider the whole matter and give relief to the debtor. In fixing the rate of interest or in considering whether the stipulated rate is reasonable or unreasonably high, the Court will consider the amount and the nature of the risk involved and undertaken by the lender. The greater the risk undertaken by the lender, the higher the rate of interest allowed ; the lesser the risk involved the lesser will be the rate of interest allowed, by the Court. The Court will consider whether or not the lender had any security of the borrower on which the lender could rely in case of non-payment of moneys due to him. If money is lent or advanced on mortgage or pledge or a charge, the lender would not be justified in charging a very high rate of interest ; on the other hand, where the lender did not have any mortgage, pledge or charge, made in his favour by the borrower, the lender could be justified in having or charging a heavy rate of interest. When no rate of interest

is mentioned in the instrument, interest is payable at the rate of 6 per cent. per annum from the date at which the same ought to have been paid by the party liable until the actual tender or realization of the amount, or until such date after the filing of the suit, as the Court may think fit. Moreover the rates of interest are restricted by local Acts—the Provincial Money Lender's Acts.

As a promissory note payable on demand is payable from the date of the note and not the date at which the demand for payment is made, the interest on the amount of such note runs from the date at which it is made. (*F. Edulji v. Essa*, 28 Bom. L. R. 141) Interest at 6 per cent. per annum is recoverable if the note is silent on the question of interest. Such interest is recoverable in the case of a demand pro-note from the date of the note. (30 Bom. L. R. 1.)

### **Delivery of Instrument on Payment or Indemnity in case of loss** [Sec. 81]

\* Any person who is liable to pay, and is called upon by the holder to pay, the amount due on a promissory note or bill of exchange or cheque, is, before payment, entitled to have the instrument shown to him, and he is, on payment, entitled to have the instrument delivered to him. If the instrument is lost or cannot be produced, the person who is sought to pay is entitled to be indemnified by the payee or the holder against any further claim on the very instrument in case the same be found.

### **Discharge from Liability on Negotiable Instruments** [Secs. 82-87]

The liability on negotiable instruments is discharged in any one or more of the following ways :—

- (1) By cancellation by the holder of the acceptor's or indorser's name with the intent to free him from liability. [Sec. 82 (a)].
- (2) When the holder otherwise discharges the maker, acceptor or indorsers from liability ; [but such discharge does not discharge any collateral security in respect of the debt. (1877, 3 C. P. D. 60)]. [Sec. 82 (b)]
- (3) By payment in due course of the amount mentioned on the instrument. [Sec. 82 (c) and Sec. 85.]
- (4) By allowing the drawee more than 48 hours to deliberate whether he would accept the instrument ; in counting the period of 48 hours, public holidays and Sundays are not to be counted. [All parties who do not consent to allowing the drawee more than 48 hours for deliberation are discharged from liability to the holder.]  
Section 83.



- (5) When the cheque is not presented for payment within reasonable time of its issue, and the drawer or person on whose account it is drawn had the right at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid, and by reason of delay which is unreasonable, he suffers actual damage, he is discharged to such damage suffered. In considering as to what is a reasonable time, regard must be had to the nature of the instrument, the usage of trade and of bankers, and the facts of each particular case. [Section 84.]

A draws a cheque for Rs. 5,000. The payee presents the cheque for payment after a reasonable time has lapsed. The bank fails before the cheque is presented. The drawer is not liable, because had the cheque been presented without unreasonable delay, the drawer had funds at the bank and before its failure the bank would have made the payment. The payee or the holder, therefore, cannot sue the drawer for the amount of the cheque, but his remedy would be to prove against the bank's liquidator or against the Official Assignee or Official Receiver for the amount of the cheque.

A draws a cheque at Bombay on a bank in Lahore. The holder presents it for payment without any unreasonable delay, but the bank failed and the holder did not get his money. The holder is entitled to receive the money from the drawer for the drawer is not discharged in this case, the cheque having been presented within a reasonable time and without any unreasonable delay.

- (6) By a qualified or conditional acceptance, accepted by the holder, all the parties whose consent to such acceptance was not taken by the holder get discharged. [Sec. 86.]
- (7) By failure of the holder to present a bill of exchange (which was under the law required to be presented for acceptance) for acceptance by the drawee, unless the presentment for acceptance is otherwise excused. [Sec. 61.]
- (8) By reason of failure to present for payment, unless the presentment is otherwise waived or excused under the Negotiable Instruments Act. [Sec. 64.]
- (9) By want of notice of dishonour, the party entitled to notice of dishonour, is, as a rule, excused from liability. [Secs. 30, 35, 93, 95, 98.]
- (10) By material alteration without the consent of the parties. The parties whose consent to the alteration has not

been taken get discharged from liability, unless the material alteration is such as is authorised under the Negotiable Instruments Act. [Sec. 87.]

### **Qualified or Conditional or Local Acceptance [Sec. 86]**

As a rule, the acceptance must be **unconditional and unqualified**. With the consent, however, of the holder, a conditional, qualified or local acceptance would be valid ; but without the consent of the holder any such acceptance would not be valid. The holder is not bound to take a conditional or qualified acceptance. For example, if the acceptor says "accepted payable on the arrival of my ship," or "payable while I am in funds," or "accepted payable for Rs. 500 only," the holder is not bound to accept such acceptance. He can treat such qualified acceptance as equivalent to dishonour by non-acceptance, and he can then give notice of dishonour to all the parties concerned.

Even when the holder consents to a qualified, conditional or local acceptance, all other persons liable on the instrument whose consent to such conditional, qualified or local acceptance has not been taken by the holder, are discharged from liability.

An acceptance is said to be **conditional** when some condition is attached to the payment, *e.g.*, "accepted payable on the arrival of my ship".

An acceptance is said to be **partial** when the acceptor agrees to pay a portion of the amount on the instrument, *e.g.* : "Accepted payable for Rs. 1,000 only," when the instrument, say, is for Rs. 3,000 or more than one thousand.

An acceptance is said to be **local** when the acceptor undertakes to pay **only at a specified place and not anywhere else** ; or where the acceptor undertakes to pay **at a place different from the place mentioned in the bill and not elsewhere**.

An acceptance is said to be **qualified as to time** when the acceptor makes the money payable at a time different from the time mentioned in the instrument ; *e.g.*, "accepted payable three months after date," though the instrument is drawn payable one month after date.

### **Instrument not Dishonoured till Drawee in case of Need also Dishonours [Secs. 115, 116]**

Sec. 115 of the Negotiable Instruments Act provides that where a drawee in case of need is named in a bill of exchange, in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee. If the holder does not present the bill to the drawee in case of need the drawer gets discharged

from liability on the bill. [Bahadur v. Gulab Rai, 1929, Lah. (A. I. R.) 577]. If a bill has been accepted by the drawee but dishonoured subsequently by non-payment by the drawee, *i.e.*, the original drawee, the holder is not entitled to then present it to the drawee in case of need if the holder had not originally presented it to the drawee in case of need for acceptance. (Dore v. Karachiwalla & Co., 40 B. L. R. 473.)

[A drawee in case of need may accept and pay the bill of exchange without previous protest. (Sec. 116)].

### **Alteration in a Negotiable Instrument [Secs. 87-89]**

An alteration may be material, or it may be immaterial. A material alteration is an alteration in which the rights or liabilities of the parties or a party to the instrument are substantially (not negligibly) altered by a party to the instrument. (Das v. Kumar, 33 Cal. 812). When the alteration is quite insignificant, and does not prejudice the right or liability of a party, it is said to be immaterial. Where the business effect of the instrument is altered, the alteration is a material alteration. (Aldous v. Cornwall, 1888, L. R. 3 Q. B. 513.)

An alteration of the amount payable, of the rate of interest, or the insertion of a new party, or an alteration of the date of the instrument or an alteration in the time of payment or the place of payment would be regarded as material alteration. Any alteration which is material and which is effected without the consent of the other party or parties to the instrument would have the effect of discharging all other parties (Sec. 87.) who did not consent to such alteration, unless the alteration is authorised under the Act. On the other hand, the mere correction of a clerical error or an accidental slip or omission, *e.g.* changing of date from 1849 to 1949, is not a material alteration (Brutt v. Pickard, 1824, Ry. & M. 37), and if such correction or alteration is made, there is no need for having consent of the other parties to such alteration, because such alteration does not in any manner affect or alter the rights and liabilities of the parties to the instrument. (See Scholfield v. Earl of Londesborough, 1896, A. C. 514; Warrington v. Early, 1853, 23 L. J. Q. B. 47; Gardner v. Walsh, 1855, 5 E. & B. 83; Outhwaite v. Luntley 1815, 4 Camp. 179; Long v. Moore, 1790, 3 Esp. 155; Tidmarsh v. Grover, 1813, 1 M. & S. 735.)

An acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement notwithstanding any previous alteration of the instrument. [Sec. 88].

Where a promissory note, bill of exchange or cheque has been materially altered **but does not appear to have been so altered**; or where a cheque is presented for payment which does not at the time

of presentation appear to be crossed or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and in due course, shall discharge such person or banker from all liability thereon. [Sec. 89.]

### **Material Alterations allowed by the Law, without the Consent of the Other Parties.**

Material alterations allowed by the law, without consent of the other parties are :—

- (1) Filling blanks in case of inchoate stamped instruments ; (Sec. 20);
- (2) Conversion of blank indorsement into indorsements in full ; (Sec. 49);
- (3) Crossing of Cheques ; (Sec. 125);
- (4) Qualified, conditional or local acceptance (Sec. 86).

### **NOTICE OF DISHONOUR [Secs. 91-98 ; and Secs. 105-107]**

#### **Raison d'être of Notice of Dishonour**

Dishonour of a negotiable instrument which is a bill of exchange or promissory note or cheque may take place by non-payment, and of bill of exchange, by non-acceptance as well as by non-payment. When the drawee is incompetent to contract, the bill may be treated as dishonoured by non-acceptance. [Secs 91, 92].

So that a party liable on a negotiable instrument may not be compelled to lock up his money for more than a reasonable time, notice of dishonour must be given. Otherwise it can be presumed that the instrument was honoured in due course.

#### **Notice of dishonour by non-acceptance or by non-payment**

Notice of dishonour should be given to all parties who are intended to be made liable on the instrument. Such notice must be given within a reasonable time by the holder or by any party liable on the instrument. (Chapman v. Keane, 1835, 3 A. & E. 193). The notice may be sent by post ; it may be in any form oral or written. If the notice is duly addressed and sent by post, but does not reach the other party, the miscarriage of the notice does not render it invalid. (Sec. 94). Any party receiving notice of dishonour must, if he wishes to render liable any prior party to himself, give notice of dishonour to such prior party within a reasonable time. (Sec. 95). Notice of dishonour must be given within a reasonable time, *i.e.*, if the

holder and the party to whom notice of dishonour is given reside or do business in the same place, the notice of dishonour is said to be given within a reasonable time if it is sent by the next post or so as to reach its destination on the day next after the day of dishonour or, if the parties carry on business or reside in different places, notice of dishonour is said to be given within a reasonable time if it is sent by the next post or on the next day after the day of dishonour. Mere knowledge that the instrument has been dishonoured is not the requisite notice. (*Cory v. Scott*, 1820, 3 B. & Ald. 619.)

### Consequence of Failure to give Notice of Dishonour [Secs. 105, 106]

As a rule, all parties who are entitled to notice of dishonour and are not given such notice, get discharged **even on the original debt**. (24 Bom. 360.)

### Cases in which Notice of Dishonour is excused [Sec. 98]

No notice of dishonour is necessary—

- (1) when the parties entitled to the notice of dishonour dispense with such notices ; (in such a case all the parties **subsequent** to the party waiving his right to notice (but **not the prior** parties) also get discharged (1886, T. L. R. 657 ; and 12 East. 434);
- (2) to hold the drawer liable, when the drawer has countermanded payment.
- (3) when the party charged could not suffer damage for want of notice of dishonour, (*e.g.* when there were no funds) ; 2 Bom. L. R. 891 ;
- (4) when the party entitled to receive notice cannot after reasonable search be found (*Bateman v. Joseph*, 1810, 2 East. 433) ; or the party bound to give notice is, for any other reason, unable without any fault of his, to give such notice ;
- (5) to hold the drawer liable when the acceptor also is a drawer ;
- (6) in the case of promissory note which is not negotiable ;
- (7) when the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument. (*Belgaum Bank v. Raghunath*, 47 B. L. R., 336).

**Form of notice of dishonour to drawer of a bill of exchange**

Address

(of the person giving notice)

Date,

I hereby give you notice that a bill of exchange No..... dated.....drawn by you on.....(name of drawee) of.....(his address) for Rs.....payable to (name of payee) or order.....months after date, has been dishonoured by the said drawee by refusal to accept /or by refusal to pay (state as the case may be) and that I have to hold you responsible for the payment of the money under the instrument.

To

(Name of drawer and his address)

Signature.

**Notice of dishonour to an indorser of a bill of exchange**

Address

(of the person giving notice)

Date,

I hereby give you notice that a bill of exchange No..... dated.....drawn by (state name of drawer) of..... (his address) for Rs.....payable to..... (name of payee) or order.....months after date and bearing your indorsement has been dishonoured by the drawee by non-acceptance/by non-payment (state as the case may be) and that I have to hold you responsible for the said dishonour.

To

(Name of indorser and his address)

Signature.

**NOTING AND PROTEST [SECS. 99-104A]****Noting [Sec. 99]**

When a promissory note or bill of exchange is dishonoured by non-acceptance or non-payment, the holder of it may go to a notary public and have the fact of the dishonour noted by him (the notary public) upon the instrument itself, or upon a paper attached to the instrument, or partly upon the instrument and partly upon the paper attached to it. (Sec. 99.) A note made by the notary public must be made within a reasonable time after dishonour of the instrument, and must specify the date of dishonour, the reasons for, if any, assigned for such dishonour, or, if the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured, and the charges of the notary public. (Sec. 99).

**Notary Public [Sec. 138]**

[A notary public is an officer, usually a solicitor, empowered by the Provincial Government to attest foreign documents and to note and protest bills of exchange and promissory notes. [Sec. 138.]

**[Advantage of Noting and/or Protest Sec. 104]**

The advantage secured by a noting or a protest is that the fact of the dishonour can be recognised as good *prima facie* evidence in a Court of law. Noting is not compulsory or necessary in the case of an inland bill or note, but it is compulsory in the case of some types of foreign bills, *viz.*, bills of exchange which by the law of the foreign country require noting or protesting. Under Section 104 of the Negotiable Instruments Act, foreign bills of exchange must be protested for dishonour when such protest is required by the law of the place where they are drawn. But a foreign bill **drawn in India** and made payable, and drawn on a drawee, outside India, does not require protest though the law of the place where it is payable may require such protest.

**Protest [Secs. 100-104A]**

When a promissory note or bill of exchange has been dishonoured by non-acceptance, or by non-payment, the holder may, within a reasonable time, cause such dishonour to be noted **and certified** by a notary public ; such **certificate** is called the protest. (Sec. 100).

When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder may, within a reasonable time, cause a notary public to demand better security of the acceptor, and on its being refused, may, within a reasonable time, cause such facts to be noted and certified. Such certificate is called a protest for better security. (Sec. 100).

The difference between noting and protest is that whereas noting must precede a protest and contains the fact of dishonour along with other particulars all mentioned on the instrument itself or a piece of paper attached thereto, a protest, on the other hand, is a **certificate** to the effect that dishonour has been done, *i.e.*, the protest is that which follows a noting. **The certificate given by the notary public, *i.e.*, the protest, must contain, the following particulars :—**

- (1) The instrument itself or a literal transcript of the instrument and of everything written or printed thereon.
- (2) The name of the person for whom and the name of the person against whom the instrument has been protested.
- (3) A statement that payment or acceptance or better security, as the case may be, has been demanded of such person, by the notary public ; the answer given to the notary public by the other person, or if he gave no answer, a statement by the notary public that no answer was given, or that he could not be found ;

- (4) When the note or the bill is dishonoured, the place and time of dishonour or of better security being refused;
- (5) Subscription of the notary public ;
- (6) If there is an acceptance for honour or of payment for honour, the name of the person by whom, or the person for whom, and the manner in which, such acceptance or payment was offered and effected. [Sec. 101.]

When a promissory note or a bill of exchange is required by law to be protested, notice of such protest must be given instead of notice of dishonour, in the same manner and subject to the same condition as a notice of dishonour ; the notice of protest may be given by the notary public himself. [Sec. 102].

**When is Noting equivalent to (as good as) Protest ? [Sec, 104A]**

When a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted in furtherance and with the intention of making a protest. If the noting has been done before the expiration of the specified time, or the taking of the proceedings, the protest may be done even after the specified time, **because the noting was intended to be followed by a protest, and was a first step towards the protest.** [Sec. 104A.]

**FORM OF PROTEST OF A BILL OF EXCHANGE FOR  
NON-ACCEPTANCE OR NON-PRESENTMENT**

**Protest by Notary Public**

I,.....(name of notary public) of.....  
(address of notary public), a notary public by lawful authority appointed and sworn, did, on (state date), at the request of.....  
(write the name of the holder), the holder of the original bill of exchange, of which a true copy is given hereunder, exhibit and send the said original bill of exchange to (state name of the drawee), the drawee under the said bill (in case of dishonour by non-payment by the drawee who had accepted it, add the words : who had accepted the same) at (state the place where the bill was presented) and did demand acceptance of the said bill by the drawee (or, in case of dishonour by non-payment, state: did demand payment) but the (drawee or acceptor, as the case may be) refused to accept (or to pay) the same. Wherefore I at the request of the said holder did, and do hereby, protest against the drawer of the said bill of exchange and all the other parties thereto and all others concerned for all costs of exchange, re-exchange and all costs, damages and interest resulting from non-acceptance (or non-payment).

Witnesses :—

(1) X. Y. M.

(2) P. Q. T.

Attested by me :—

Notary public

of.....

(Here give an exact copy of the bill with all the indorsements on it)



**Form of Protest of a Bill of Exchange for want of Better Security  
by Drawee (Acceptor) who, having accepted the Bill, has  
become insolvent**

[Use the form preceding this form, but instead of the words : "did demand acceptance (or did demand payment)" the words : "did demand security for payment of the bill when the same becomes mature in so far as the (drawee).....has become insolvent," and for the words : "the drawee (or acceptor) refused to accept (or pay) the same," use the words : "and the said drawee replied that security for the payment of the amount could not be given," and, in the last line, instead of the words "resulting from non-acceptance (or non-payment)" use the words : "for want of better security for the payment of the bill at maturity."

**ACCEPTANCE FOR HONOUR [SECS. 108-112]**

**Conditions under which Acceptance for Honour can be made [Sec. 108]**

Acceptance for honour of the drawer, or of any other party liable already on the instrument, can be made by a person who is a **stranger to the instrument**, *i.e.*, who is not a person already liable on the instrument, **after the instrument is noted or protested** with a notary public, **provided the holder consents** to such acceptance for honour. (Sec. 108). The acceptance for honour is written on the instrument, thus : "Accepted *supra protest*", or "accepted s. p. for the honour of A. B. the drawer", or "accepted for the honour of X. Y. the indorser named as such on the instrument".

**How should Acceptance for Honour be made ? [Secs. 109, 110]**

A person wishing to accept for honour must, by writing on the bill in his own handwriting, declare that he accepts under protest the protested bill for honour of the drawer or of any particular indorser whom he names, or generally for honour. (Sec. 109). If he does not mention the party for whose honour he has accepted, he is deemed to have accepted for the honour of the drawer. (Sec. 110.)

**Liability of Acceptor for Honour and Rights of such Acceptor  
[Secs. 111, 112]**

An acceptor for honour is liable to all parties who come **subsequent to the party for whose honour he accepts** to pay the amount of the bill, **provided the bill has been sent once again to the drawee for payment and the drawee has refused payment and the bill is again noted and protested.** (Sec. 112.) Such party and **all the parties prior to such party** are liable to compensate or reimburse the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance, because all prior parties are liable to subsequent parties. An acceptor for honour is liable to the holder of the bill

provided the bill is presented, or forwarded for presentment to him (in case the address given by such acceptor on the bill is a place other than the place where the bill is made payable), not later than the day next after the day of its maturity. (Sec. 111.)

An acceptor for honour cannot be held liable unless the bill has on its maturity been presented to the drawee for payment, and has been dishonoured by him, and noted or protested for such dishonour. (Sec. 112.)

### **PAYMENT FOR HONOUR [Secs. 113, 114]** \*

#### **What is Payment for Honour? [Sec. 113]**

When a bill of exchange has been noted or protested for non-payment, **any person** (whether a stranger or whether a person already liable on the instrument), may pay the same for the honour of any party liable on the instrument, provided that **the person so paying or his agent in that behalf has previously declared before a notary public the party for whose honour he pays**, and such declaration has been recorded by such notary public. (Sec. 113.)

#### **Points of Difference between Acceptance for Honour and Payment for Honour**

Whereas an acceptor for honour cannot be a person already liable on the instrument, a payer for honour can be anybody liable or not on the instrument. The person paying or his agent must declare liable before the notary public the party for whose honour he pays, and such declaration must have been recorded by the notary public. Acceptance for honour is, in its character something qualified or conditional, the liability arising only after the original drawee persists in dishonouring by non-payment. (1812, 6 East. 391—Hoare v. Cazenove.)

After the bill has been paid *supra protest* it ceases to be a negotiable instrument. (*Ex parte* Swan, 1886, L. R. 6 Eq. 344.)

#### **Conditions Precedent to Payment for Honour**

The conditions precedent to payment for honour are :—

- (1) That the bill must have been noted, or protested for non-payment ;
- (2) That the payer or his agent must declare before a notary public the person for whose honour he pays and that the notary must have recorded such declaration ;
- (3) That the payment is made for the honour of some party liable on the instrument.

#### **Rights of the Payer for Honour [Sec. 114]**

A person paying for honour is entitled to all the rights, in respect of the bill, which the holder had at the time of such payment. and

may recover from the party for whose honour he pays all sums so paid with interest thereon and with all expenses properly incurred in making the payment ; **but this right and remedy of a payer for honour can only be enforced against the person for whose honour he pays and all parties prior to such person.** All parties coming subsequent to the party for whose honour the payment has been made are discharged from liability. (Sec. 114). A payer for honour is entitled to receive, upon payment to the holder, the amount of the bill and the notarial charges, both the bill and the certificate or the protest. **A payer for honour is subject to the liabilities of the holder,** and therefore cannot sue the prior parties liable to him, unless they receive notice of dishonour.

### Notarial Act of Honour

When a notary public certifies that a dishonoured bill of exchange, of which a true copy is contained in the protest, was exhibited by him to the payer for honour who declared that he would pay the amount payable under the bill and did pay the same for the honour of the drawer, or the acceptor or an indorser, of the bill, and holding the said drawer, acceptor or indorser (for whose honour he paid), responsible to him for repayment to him of the amount paid by him for honour, the act of the notary public in issuing the certificate is known as notarial act of honour (required on payment *supra protest*).

A similar certificate may be given in the case of acceptance for honour *supra protest* ; in such case also, the act of the notary public is called **a notarial act of honour.**

#### Form of Certificate by Notary Public on Payment for Honour— Notarial Act of Honour

I,.....(state name of the notary public) of.....  
(state his address or place), being a notary public duly authorised and sworn, hereby certify that on.....(state date), in.....(state place), the Original bill of exchange for Rs....., drawn by.....(state name of drawer, on.....(state name of drawee) of.....  
(address of drawee), of which a true and exact copy contained in the protest which is hereto annexed, was by me duly exhibited to.....(state name of the payer for honour) of (state address of payer for honour) who declared that he would pay, and actually did pay, the sum due on the said bill for the honour of .....(the drawer, or of the acceptor or indorser), holding the said drawer, (or acceptor or indorser, as the case may be), and the other parties concerned, responsible to him the said payer for honour for the said sum and for all interest damages and costs.

Dated the.....day of.

Seal of Notary Public.

Signature of Notary Public.

### Compensation [Sec. 117] Re-draft

The holder is entitled to the amount due upon the instrument and all expenses properly incurred in presenting, noting and protesting it.

When the person liable resides at a place different from that at which the instrument is payable, the holder is entitled to receive such sum at the current rate of exchange between the two places.

An indorser who being liable, has paid the amount due on the same, can claim the amount so paid with interest at six per cent. per annum from the date of payment until tender or realization thereof with all expenses caused by the dishonour. When the person charged and such indorser reside at different places, the indorser can claim such amount at the rate of exchange between the two places.

The party entitled to compensation may instead of receiving payment for cash, draw a bill upon the party liable to compensate him, payable at sight or on demand for the amount due to him, and all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof, if any. If such bill is dishonoured, the party dishonouring it is liable to compensate in the same manner as in the case of the original bill. The new bill given is known as **re-draft**.

### Special Presumptions in the case of Negotiable Instruments [Sec. 118]

**Unless and until the contrary is proved by evidence**, the following are the **presumptions** in a Court of Law on a negotiable instrument:—

1. Every instrument is presumed to have been drawn or made **for consideration**, and every instrument, when it has been accepted, indorsed, negotiated, or transferred, is presumed to have been accepted, indorsed, negotiated or transferred for consideration.

The party (defendant) alleging want or absence of consideration must prove that allegation. The burden of proof is, as a rule on the defendant making the allegation; (*Percival v. Frampton* (1835, 2 C. M. & R. 180); where the facts tend to show an **unconscionable** transaction, the burden of proof gets shifted, and the plaintiff must then prove the presence or adequacy of consideration. (*Moti v. Mehdi* 20 Bom. 367; *Kadher v. Narain*, 1943 All. 163.)

2. Every negotiable instrument **bearing a date** is presumed to have been made or drawn **on that date**.
3. Every accepted bill of exchange is presumed to have been **accepted within a reasonable time after its date and before its maturity**.

4. Every **transfer** of a negotiable instrument is deemed to have been made **before its maturity**. (Parkin v. Moon, 1836, 7 C. & P. 408.)
5. Indorsements appearing on a negotiable instrument are presumed to be in the **same order** in which they appear on the instrument. [But successive indorsers of a note could prove that as between themselves, they were co-sureties. (Macdonald v. Whitfield, 1883, 8 A. C. 733.)]
6. A lost promissory note or bill of exchange is presumed to have been **duly stamped**.
7. The **holder** of a negotiable instrument is **presumed to be a holder in due course**. (Shaha v. Bengal National Bank, 47 Cal. 871 ; Royal Bank of Scotland v. Rahim, 49 Bom. 270). But where proof is adduced to the effect that the instrument was obtained from its holder, maker or acceptor (or from any person holding it for the holder), by means of an offence or by fraud or for an unlawful consideration, the burden of proof then gets shifted on to the holder who has then to **actually prove** that he was a holder in due course. (Daulatram's case, 15 Bom. L. R. 333 ; Sikdar v. Secretary of State for India, 36 Cal. 239.)

In a suit upon an instrument which has been dishoured the Court shall, on proof of the protest, **presume the fact of dishonour** unless such fact is disproved. [Sec. 119]

#### **Estoppels in case of Negotiable Instruments. [Secs. 120-122.]**

1. No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer, shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn. (Sec. 120). [This, however, **does not prevent a minor** from denying the validity of a note on the ground that he was a minor at the date of the note.] (Chengal Chetty v. Nainappa, 117 I. C. 133.)

2. No maker of a promissory note and no acceptor of a bill of exchange payable to order shall, in a suit thereon by a holder in due course, be permitted to deny the capacity of the payee, at the date of the note or bill, to indorse the same. (Sec. 121.) (Jones v. Darch, 1817, 4 Price 300 ; Smith v. Marsack, 1848, 6 C. B. 486). But it can be shown that the payee was only a benamidar. (Reddiar Akkal, 58 Mad. 693.)

3. No indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or contractual capacity of a prior party. (Sec. 122.)

#### **Crossed Cheques [Secs. 123-131A]**

When a cheque bears across its face an addition of the words

“and Company” or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, that addition shall be deemed to be a **general crossing**. Such a cheque is said to be a generally crossed cheque. (Sec. 123). But a cheque which bears no crossing, is said to be an **open** cheque payable at the counter. The holder can cross an uncrossed cheque and have it put it in his account. Such an alteration though material is allowed under the Act.

Where a cheque bears across its face an addition of the name of the banker that addition shall be deemed to be **crossed specially** to that particular banker. It is a **special crossing**. (Sec. 124). When a cheque is uncrossed, the holder may cross it generally or specially. (Sec. 125). Where the cheque is crossed generally, the holder can cross it specially by insertion of the name of a banker. (Sec. 125.)

When a cheque is crossed specially, the banker to whom it is crossed may again cross it specially **to another banker as his agent for collection**. (Sec. 125.) When a cheque is crossed generally the banker on whom it is drawn must not pay it otherwise than to a banker (Sec. 126) ; but when it is crossed specially, the banker on whom it is drawn can pay it only to the banker to whom it is crossed, or to his agent for collection, but not otherwise. (Sec. 126). When a cheque is crossed specially to more than one banker, except when crossed to an agent for collection, the banker on whom it is drawn must refuse payment on that cheque. (Sec. 127)

When the banker on whom a crossed cheque is drawn pays the same in due course, the banker paying the cheque and the drawer thereof shall be discharged.

Sections 128 and 131 of the Negotiable Instruments Act give the collecting bankers great protection. A collecting banker is not liable if it turns out that the person to whom the payment is made was not really entitled to it, if the collecting banker acted in good faith and without any negligence or grounds for suspecting something wrong or irregular and if he collected the money for a customer and acted only to receive the money as a collecting agent, and if the cheque on which he collected the money was **crossed** by the holder or by the drawer **before it got into the hands of the banker**. A collecting banker should not himself cross an uncrossed cheque ; if he does so he will not receive the protection afforded by Section 131.

Section 85A of the Negotiable Instruments Act protects bankers in the case of bank drafts also. Where a banker draws on its own branch, or head office, the draft is called a banker's draft. Sec. 85A gives bankers the same protection in and immunity from liability in case of bank drafts bearing forged indorsement as in the case of cheques. The paying bank is discharged by payment in due course.

Section 129 provides that any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially

The draft is endorsed then to the order of the collecting banker. The bill of lading, however, is, as a rule, indorsed in blank. A slip is attached to the draft instructing the bankers whether the documents are to be given up when the acceptance is made or when the draft is paid. A letter of hypothecation (authorising the collecting bank to sell away the goods if the bill is dishonoured is sometimes attached by the shipper to the bill and the shipping documents.

### Re : International Law [Secs. 134-137]

In the absence of a contract to the contrary, the liability of the maker or drawer of a foreign promissory note, bill of exchange or cheque, is regulated in all essential matters by the law of the place where the instrument was made; and the liability of the acceptor and of the indorser shall be governed by the law of the place where the instrument is made payable. (Sec. 134.)

When a promissory note, a bill of exchange, or cheque, is made payable in a different place from that at which it is made or indorsed, the law of the place where it is made payable is the law governing what constitutes dishonour and what notice of dishonour is required. (Sec. 135.)

If a negotiable instrument is made, drawn, accepted or indorsed outside India, but in accordance with the law of India, then the circumstances that any agreement evidenced by such instrument is valid according to the law of the country wherein it was made does not invalidate any subsequent acceptance of indorsement made thereon in India. (Sec. 136.)

The law of any foreign country regarding promissory notes, bills of exchange and cheques shall be presumed, unless the contrary is proved, to be the same as that of India. (Sec. 137.)

### Renewing a Bill of Exchange

When the acceptor anticipates that he will not be able to pay the amount payable on the bill accepted by him, he may write to the drawer asking him to **renew** the bill; he will *a fortiori* do so if he has accepted the bill on the arrangement that it should, if required, be renewed. The acceptor may then pay, according to the arrangement, something on account of the bill or may not pay anything. In either case he accepts the renewed bill. If he has paid something on account of the original bill he would accept the renewed bill for the difference, with interest; otherwise he has to renew the whole bill with interest. He has also to pay for the stamp on the fresh (renewed) bill. The drawer then cancels the original bill and sends it back to the acceptor.

## HUNDIS

### Meaning of "hundi"

A hundi is a negotiable instrument in the vernacular or an oriental language. If it is in the form of a promissory note it is, in some localities, called a "teep", and in certain other parts a "rukha". When a hundi is paid up it is known as a "khokha". In the Punjab, the drawer or maker of a hundi can, by crossing the hundi and putting the words "sri-nisani", exclude his liability on the hundi.

### As a rule, Hundis governed by local usages and customs

A hundi is, generally, governed by the customs and usages in the locality, but when a custom is silent on the point involved in a dispute before the Court, the Negotiable Instruments Act applies to the hundi; Section 1 of the Negotiable Instruments Act provides that, by express writing on the hundi itself the parties may agree that in case of dispute, the local usage and customs shall be excluded and the Act shall apply.

### Types of Hundis

We shall now consider the different types of hundis. There are the following types :—

- |                    |                     |                                      |
|--------------------|---------------------|--------------------------------------|
| (1) Shah Jog Hundi | (5) Dhani Jog Hundi | (9) Firman Jog Hundi                 |
| (2) Jokhmi Hundi   | (6) Jawabi Hundi    | (10) Nishan Jog Hundi                |
| (3) Darshani Hundi | (7) Nam Jog Hundi   | (11) Peth and Perpeth                |
| (4) Muddati Hundi  | (8) Dekhanhar Hundi | (12) Zickri Chit, or<br>Tickri Chit. |

### Shah Jog Hundi

A shah jog hundi means a hundi which is payable only to a shah. A shah means a respectable person in the locality. A respectable person means a man of money and not a man of straw. As a general rule, acceptance by the drawee of a shah jog hundi is not written on it, but the particulars only are entered in the drawee's books of account, and the hundi is not presented for acceptance before it is either due or overdue. A shah jog hundi is a bearer hundi, and passes from hand to hand by mere delivery without any indorsement, till it reaches the shah. Once it reaches the shah it ceases to be a bearer hundi. It can only be paid to a shah. But if the shah gets money on a hundi stolen or taken by fraud or forgery, the shah does not get a good title to it unless he produces the actual drawer or the person who committed the fraud or theft; otherwise he is to refund the money which he received, with interest thereon. The claim to a refund of money received by the Shah must be made as soon as possible after the fact of forgery has been discovered, so that the Shah can be protected. (*Bansidhar v. Jwala Prasad*, 16 Bom. L. R. 34.)



### Jokhmi Hundi

A jokhmi hundi is a hundi which the drawee has to accept or pay only upon the happening of an event, but not otherwise. Unlike a bill of exchange which cannot be drawn conditionally, a hundi of this type can be drawn conditionally. Such a hundi resembles a policy of insurance, with this difference, however, that whereas in an insurance of the ordinary type the insurer has to pay the insured for the loss suffered by him only after the loss has taken place, in the case of jokhmi hundi the moneys are paid in advance as if the loss had taken place though none has already taken place. It is of great use when goods are sold and sent from one place to another. The seller draws a hundi on the buyer who becomes the drawee. The seller then discounts the hundi with an insurer, so to say, who discounts the hundi and makes payment in advance, charging his commission. The commission charged is his premium. The drawee who is the buyer need not pay unless he gets the goods, for the hundi is drawn conditionally, and thus the buyer is protected. The seller also does not lose anything even if the goods are lost on the way, because he has already the money less the discount from the insurer, and the insurer or discounter would get the refund of what he paid already on the hundi, if the goods reach safe, because he is named as the payee under the hundi, and he will receive back the money from the buyer (the drawee). In *Jadowjee Gopal v. Jetha Shamji*, 4 Bom. 333, it was held that if the goods sent under a jokhmi hundi are lost, the discounter (insurer) who is the holder cannot claim the money payable under it; but the holder can claim the full amount if the goods got **partially** lost or damaged.

### Darshani Hundi

A darshani hundi is a hundi which is payable at sight. The acceptor has to pay the amount specified in it on darshan, *i.e.*, on sight.

### Muddati Hundi

It is a hundi payable on the expiration of the muddat, the period of time fixed by the hundi.

### Dhani Jog Hundi

A dhani jog hundi is one payable to **dhani**, *i.e.*, owner. It is an instrument payable to bearer. (*Jetha v. Ramchandra*, 16 Bom. 689.)

### Jawabi Hundi

A jawabi hundi is so called because the transaction takes place as in the case of remittance of money through a banker from one place to another or like a money order through a Post Office. The payee who receive the money under the hundi sends his receipt or jawab (answer.) to that effect.

### **Nam Jog Hundi**

A nam jog hundi is payable to a party named in the bill or order. The bill may or may not be accompanied by a description of the party concerned. If there is a descriptive role of the party concerned, the hundi cannot be indorsed or transferred, but when there is no such description it can be indorsed or transferred.

### **Dekhanhar Hundi**

A dekhanhar hundi is a hundi payable to bearer or the person presenting it for payment.

### **Firman Jog Hundi**

It is a hundi which is payable according to its maker's firman (order). It is a hundi payable to order.

### **Nishan Jog Hundi**

It is a hundi which is to be paid only to the person presenting it.

### **Peth and Perpeth**

When the holder of a hundi has lost it, he may be given a duplicate of the lost one. The duplicate is called "Peth".

When the holder who has lost a duplicate of the original hundi, is given another duplicate, the other duplicate is called "Perpeth".

### **Zickri Chit or Tickri Chit**

A zickri chit or tickri chit, or a letter of protection, as it is known all over India, is issued in connection with Marwari Hundis. When the original hundi is not accepted, a chit is issued to the holder by some prior party to the hundi. The chit is addressed to some respectable person residing in the locality. Such person usually accepts the hundi and pays it on maturity. The acceptance is given in writing on the zickri chit or tickri chit as it is known. It constitutes a letter of protection or an acceptance for honour. Whereas under the Act, in the case of a bill, acceptance for honour pre-supposes a noting or protest, a hundi requires no noting or protest if it is to be accepted for honour.

### **Points of distinction between Bills of Exchange and Hundis**

#### **Bills of Exchange**

1. Bills of exchange are instruments in the English language or an European language.

#### **Hundis**

1. Hundis are bills of exchange or promissory notes (negotiable instruments) in an oriental language.

### Bills of Exchange

2. Bills of exchange are governed by the provisions of the Negotiable Instruments Act.

3. Acceptance by the drawee is written on the bill of exchange.

4. Some bills of exchange require compulsory presentment for acceptance by the drawee, *e.g.*, bills payable after sight, or where expressed to be presented for acceptance.

5. Before a bill can be accepted for honour it requires noting or protest by a notary public.

6. A stolen bill, or a bill obtained by fraud which does not vitiate consent *ab initio*, gives a good title to a holder in due course.

7. Bills cannot be drawn or made payable conditionally.

### Hundis

2. Hundis are governed, as a rule, not by the Negotiable Instruments Act, but by local usages and customs of trade; the Negotiable Instruments Act applies to hundis only in the absence of a local usage or custom, or when expressly made applicable, by express writing, to that effect, on the hundi.

3. As a rule, acceptance on the hundi is not written on the hundi, but merely the particulars of the acceptance are entered in the books of the drawee.

4. As a rule, a hundi does not require presentment for acceptance; and, in a *shah jog* hundi, may be presented only after it is due or overdue.

5. According to the usage of Shroffs a hundi can be accepted for honour though it is not noted or protested. This is usually done under a *zickri* or *tickri* chit.

6. In the case of a *Shah jog* hundi, the *Shah* who is paid is bound to refund the money with interest, unless he produces the actual drawer or the person who committed the fraud or the theft.

7. A hundi, *e.g.*, the *jokhmi* hundi, can be drawn conditionally, so that the money is payable in a contingency, *e.g.*, the arrival of the goods and their receipt by the buyer (drawee) either in good condition or even partially damaged. (*Jadowji v. Jethaji*, 4 Bom. 333).

## **CHAPTER XXII**

### **Letters of Credit**

A letter of credit (L/C), is an order by a banker on his/its own branch or on some other banker, directing that the beneficiary (*i.e.* holder of the letter) should be given a specific credit, as per the conditions mentioned in the letter.

There are various types of letters of credit. Under one type, there is an order by a banker on its/his branch or itself/himself, whereby the beneficiary under the letter is allowed to draw on the bank to the maximum extent specified in the letter and for a specified period of time, usually six months. Another kind of L/C is that in which one bank asks another bank to allow the holder to draw upon it/him upto a specified amount. In the latter case the banker issuing the letter of credit is to be charged with the total amount of all cheques honoured by the other banker or for all the payments made by the other banker on the strength of the letter.

#### **“Clean” or “Open” Letter of Credit**

A “clean” or “open” letter of credit is one in which no condition. are attached to the acceptance of bills of exchange drawn under the letter. It contains an unconditional undertaking to pay or accepts

#### **“Documentary” Letter of Credit**

A **documentary** letter of credit is one in which the promise to accept bills of exchange drawn on the banker or the promise to pay to the extent of the specified amount is a conditional promise, *i.e.*, the documents of title to the goods with regard to which the bills of exchange are drawn must be sent along with the bills of exchange to the bank which issued the L/C so that the same be accepted by the issuing bank.

#### **“Marginal” Letter of Credit**

A **marginal** letter of credit is one in which the terms of the issue are contained in the margin. The terms of drawing and acceptance of the bills of exchange are given in the margin. The marginal L/C must not be detached from the bill portion of the L/C.

#### **“Circular” Letter of Credit**

A **circular** letter of credit is one in which the issuing bank requests its correspondent in a foreign country to honour all the cheques and orders of the holder of the L/C to the extent to which the issuing bank has undertaken to honour the same. Such letters facilitate foreign trade.

**Traveller's Letters of Credit—Letters of Indication—Circular Notes**

A **traveller's letter of credit** is a letter issued by a banker and addressed to his/its correspondent in a foreign country, asking the correspondent to pay the drafts drawn upon him by the holder of the L/C, to the extent to which such drawing is allowed by the L/C. Such letters are given by the issuing bank to the holder who pays cash for the same. Travellers who cannot conveniently or safely carry cash with them can buy such letters and get money, in the foreign territories through which they travel, as and when necessary. The signature of the beneficiary (who is identified) is attested by an additional document called the **Letter of Indication** which the traveller must carry with him. Particulars of the payment (whenever made) are entered by the payer on the letter of credit.

**Circular Notes** are cheques (each for the same sum, whatever the sum be) drawn on the banker who issues them. Such notes can be cashed by the holder (traveller) in any foreign country where the issuing banker has a correspondent. The correspondent is reimbursed by drawing a draft (payable at sight) on the issuing banker.

**“Revocable” or “Unconfirmed” Letters of Credit and “Irrevocable” or “Confirmed” Letters of Credit**

A letter of credit may be **revocable** or **unconfirmed** ; or, it may be **irrevocable** or **confirmed**. If the issuing bank has the power to revoke the authority of the holder of the L/C to continue drawing on the strength of the letter of credit, the L/C is called a revocable or unconfirmed L/C. But if the issuing bank is not entitled to revoke the authority of the holder of the L/C, the L/C is known as an irrevocable or confirmed L/C.

**The Raison D'être and utility of Letters of Credit**

Letters of credit serve a very useful purpose in financing foreign trade. The *raison d'être* of letters of credit lies in the necessity to satisfy the needs of foreign trade—to enable foreign traders to export their goods without much risk.

**Is a Letter of Credit a Negotiable Instrument ?**

In *Orr & Barber v. Union Bank of Scotland*, 1854, 1 Macq. H. L. Rep. 513, it was held that a letter of credit is not a negotiable instrument. The rules applicable to negotiable instruments do not apply to letters of credit.

**Payment of a Draft—Effect of Forgery—Duty of the Bank to take care before paying**

As a letter of credit is not a negotiable instrument, but merely a letter giving authority to and requesting a bank to whom it is

addressed to honour the cheques or drafts of the holder of the letter, the banker who pays must take care and satisfy himself about the genuineness of the signature of the holder of the letter of credit. (Orr & Barber v. Union Bank of Scotland, 1854, Macq. Rep. H. L. 513; 523.)

A letter of credit saying, "Please to honour the drafts of A to the extent of.....and charge the same to the account of B" is a mere authority to the bank to make the payment; but the possession of it by the person to whom it is addressed does not prove that the payment has been made. To show that payment has been made there must be a draft by A. But payment on a forged draft does not discharge the payer from his liability to the holder of the L/C, *i.e.*, the person whose name is forged. It is the duty of the paying bank to satisfy itself that the signature is not forged, because the person presenting the L/C is not necessarily the person entitled to make the draft. (See the case: Orr & Barber v. Union Bank of Scotland, 1854, Macq. Rep. H. L. 513—also p. 523 in the judgment in the case).

For Form of Letter of Credit, see next page, *i.e.* p. 276.

**Form of Letter of Credit**

(To be made out in triplicate. The following is sent to the customer).

**THE BANK OF INDIA LIMITED**

To .....

Address,  
Date,

Credit No.

Dear Sir/s,

At the request of.....(state the name of the customer) we have opened the following Credit in favour of.....(name of the person concerned) for any sum/sums not exceeding in all£.....(Pounds.....) only available for negotiation by our London agents.....(their name) .....of (address).....for the face amount less charges as overleaf, of drafts for invoice value drawn on.....

Amount	For account of		
Date of expiry	Available		
Against the delivery of the following documents	Full set	Bills of lading to Order	
	Invoices Insurance Policy or Certificate.		
Covering			
Shipment	From	To	On or before
Special instructions	Partial Shipments	Permitted	

Please notify.....(name of the person in whose favour the Credit is given)

Kindly acknowledge receipt

Accountant.

Yours truly,

Manager.

Another letter has to be sent to the correspondent and it commences: "Please request your.....branch to inform (the beneficiary) that revocable/irrevocable credit No.....has been opened in his/their favour by.....(name of customer)".

The third letter is sent to the beneficiary and is like the letter sent to the correspondent, but it starts: "We have to inform you that an irrevocable/revocable Credit No.....has been opened in your favour and/or.....by (state name of customer)."

## CHAPTER XXIII

### INSURANCE—GENERAL PRINCIPLES

#### The Desirability of and Necessity for Insurance

In this chapter the general Principles of Insurance, so important to the student of the Mercantile Law and the man of business, are given.

Insurance is an utmost necessity. A person wants to provide for old age or for lame days ; a *fortiori* he wants to make sufficient provision for his dependants. So also a person interested in goods sent from one place to another, whether by land or water, should provide for the risks of the transit. A person owning a house or goods in a godown would certainly, in his interests, as also in the interests of commercial prosperity, insure the property in which he is interested.

#### WHAT IS AN INSURANCE CONTRACT ?

##### Meaning of “Insurer”

An insurance contract is a contract in which one party, known as the insured (or the assured, in the case of life insurance), insures with another person, known as the insurer, assurer or underwriter, his property or life, or the life of another person in whom he has a pecuniary interest, or property in which he is interested, or against some risk or liability, by paying a sum of money known as the premium.

An “insurer” is an individual, firm or company, carrying on the business of insurance. An insurance company registered outside India but carrying on business in India or having its principal place of business in India is deemed to be an insurer. So also an insurer registered outside India is deemed to be an insurer within the meaning of Sec. 2 of the Indian Insurance Act, if, with the object of obtaining insurance business, such insurer employs a representative, or maintains a place of business, in India. A person in India having a standing contract, *i.e.*, a contract open for a term of years, with insurers who are members of the Society of Lloyd’s, whereby he is empowered to issue cover notes, protection notes or other documents granting insurance cover to others on behalf of those insurers, is also deemed to be an insurer. It is, however, important to note that an insurance agent is not an insurer.

##### Slip

Before a policy is issued, the insurance agent procures a “slip” (also known as a “memo”) in which are given the particulars of the proposed insurance. The slip when signed by the insurer shows that he will issue the policy, though he is not legally compellable to do so. It is only the properly stamped policy that gives the right of suit. The slip does not give the right of suit.



### Cover Note

A **cover note** is a document issued by the insurer for giving the benefit of the insurance to the insured during the period between the agreement to issue the policy and the actual issue of the policy.

A **properly stamped** cover note gives a right to sue for specific performance. (*Bhugwandas v. Netherlands Assurance Co.*, 14 A. C. 83). But the cover note is not to be considered as equivalent to an agreement to issue the policy. (*Surajmal v. The Triton Insurance Co.*, 52 Cal. 408.)

### Nature of Insurance Contract—*Uberrimae Fidei* Contract

A contract of insurance is a contract *uberrimae fidei* (*uberrimae fides*), i.e. a contract in which the law casts upon the insured as also the insurer the **duty to disclose** mutually every **material fact within knowledge**. If such a disclosure is not made by either party the other party can, if he so elects, avoid the agreement on the ground of a material misrepresentation. (*Carter v. Bohem*, 1 Sm. L. C. 556). Every material fact within the knowledge of the party concerned must be disclosed to the other party to the contract, because the disclosure may weigh materially on the mind of the other party. One cannot, by keeping quiet and hiding a material fact from the other party, induce him to enter into a contract which would otherwise be disadvantageous to that person. (*London Assurance Co. v. Mansel*, 1879, 11 Ch. D. 363.)

### LIFE INSURANCE AS CONTRACT CONTINGENT—MARINE AND FIRE INSURANCE AS CONTRACTS OF INDEMNITY

#### Distinction between Contract of Life Assurance and Contract of Marine or Fire Insurance

A contract of **life assurance** is a **contingent contract**, but not one of indemnity. The **full amount** of life assurance is recoverable. A man may not be worth pecuniarily much. He may be an inefficient worker, with poor equipment in life; nevertheless he has an unlimited interest in his own life, and can assure it for any amount he likes, if he is capable of paying for the insurance. (*Dalby v. Indian and London Life Assurance Co.*, 15 C. B. 365.)

A **marine or fire insurance contract**, on the other hand, is a contract of **indemnity**, so that the insured cannot claim to be paid by the insurer anything more than the amount required to re-instate him—to put him back to his original condition, i.e. his position before the loss or the damage took place. The insured cannot, in a policy of marine or fire insurance, sue for the full amount of the insurance. A has a house insured for Rs. 100,000 and the house is burnt down. What is the amount which A can recover from the insurer? A cannot recover the full amount of Rs. 100,000, if his loss is to a lesser extent, say, to the amount of Rs. 70,000. He

may have paid a premium for the policy of Rs. 1,00,000, honestly believing that he can recover the full amount. But his was the case of over insurance and he cannot recover anything more than what would be required to compensate him and restore him to his original condition ; this applies to marine insurance also: (Castellian v. Preston, 1883, 11 Q. B. D. 380.)

Secondly, in life assurance, the insurable interest must exist **at the time the policy is effected (made)**. But in fire or marine insurance the insurable interest must exist **at the time of the loss or damage also**. In life assurance it **need not exist at the time of death**.

### Contract of Insurance distinguished from Wager

(1) In a contract of insurance, there is no doubt a very great element of chance as there is in all activities of life ; but the parties (*i.e.*, the insurer and the insured) are serious and do want to do some work—some business. In a wager, two gamblers simply wait and watch, without doing or meaning to do any work or business whatever.

(2) In a contract of insurance there is something in the public interest. Public policy is in favour of protection of individuals, the members of their family and their property. But public policy is certainly against gambling by two gamblers ; it is against wagers.

(3) In a contract of insurance, which is a good conditional contract, there is what is known as the **insurable interest**, and that saves it from being a wager. A policy in which there is no insurable interest possessed by the insured is a gambling or wagering policy. [Insurable interest is that **pecuniary** interest which the insured has in the subject matter insured or in the life assured.] There must be that **pecuniary** interest called the insurable interest. In a wager there is no such interest possessed by either party.

### Assignment of Policies

A policy of insurance can be assigned by endorsement on the back of the policy, or by a separate deed of assignment, followed by a notice of the same to the insurer.

## FORMS OF ASSIGNMENT

### Assignment of a Policy by Endorsement on the Policy

I,.....(name of assignor).....of  
.....(address of assignor) do hereby assign unto  
.....(name of assignee) of..... (ad-  
dress of assignee), his heirs, executors, administrators and assigns,  
the within-written policy of assurance on the (state the subject  
matter of the insurance, *e.g.*, the goods, the building, or the ship,  
freight, cargo, as the case may be).

In witness whereof I have hereunto set my hand this.....  
day of.....19 .

Signature of assignor in the presence of.....(witness)  
.....of.....(address of witness).

### **Assignment of Policy of Insurance by a Separate Deed of Assignment**

THIS INDENTURE made this.....day of.....  
19 , between.....(name of the assignor/vendor) of  
.....(address of assignor/vendor), hereinafter called  
the assignor/vendor which term shall include his heirs, executors,  
administrators and assigns of the one part, and.....  
(name of assignee/purchaser) of.....(his address),  
hereinafter called the assignee/purchaser which term shall include  
his heirs, executors, administrators and assigns of the other part :

WHEREAS the vendor is entitled to the policy of.....  
assurance (state the kind of insurance) and has agreed to assign/sell  
it to the assignee/purchaser for the sum of Rs.....and upon  
the terms and conditions hereinafter appearing :—

NOW THIS INDENTURE WITNESSETH that in pursuance  
of the said agreement and in consideration of the sum of Rs.....  
now paid by the assignee (purchaser) the assignor (vendor) assigns  
unto the assignee (purchaser)

ALL THAT policy of insurance on the.....(state  
subject matter or the life insured) with the.....Company  
(state name of the insurer) effected on the.....day of  
.....19 , numbered....., for Rs.....  
at the yearly premium of Rs.....and all other sums payable  
and all other benefits thereunder :—

TO HOLD the same unto the assignee (purchaser) absolutely :

AND the assignor (vendor) doth hereby covenant with the  
assignee (purchaser) :—

- (1) .....
- (2) .....
- (3) .....
- (4) .....

State the conditions, *e.g.* that  
the assignor/vendor shall pay all  
such premiums or other sums as  
may be payable by the assignee  
(purchaser).

IN WITNESS WHEREOF the abovenamed.....  
(assignor/vendor) has hereunto set his hand the day and year first  
abovewritten.

Signature of assignor.  
in the presence of.....(witness) of.....(address)

## LIFE ASSURANCE

**What is a Life Assurance Contract or Policy ?**

A life assurance contract is a contract whereby the party known as the insurer (assurer) who has undertaken the liability, agrees to pay (to the nominee of the insured) on the insured's death, the stipulated sum of money, with or without profits (as the agreement may be), or agrees to pay the stipulated sum on the insured's survival to a stated age, like 50, 60, 70.

A policy under which the agreed sum is to be paid on the death of the insured or the survival of his to the stated age or contingency is called an **endowment policy**.

**Insurable Interest**

Insurable interest is that **pecuniary** interest which the person who is the insured has in the life insured. Thus in the interest of his estate a man has an unlimited interest in his own life. A person can insure the life of his wife or her husband, as the case may be, (Griffiths v. Fleming, 1909, 1 K. B. 805), where it was held that a husband has insurable interest in the life of his wife.] So also has the wife an insurable interest in the life of her husband. (Reed v. Royal Exchange Assurance Company, 1795, Peake. Add. C. 70). But the law says that a parent has no insurable interest in the life of the child *qua* the child; nor the child *qua* the parent, **unless the one has pecuniary interest in the life of the other, or unless the continuance of the life of the insured is to give some pecuniary benefit to the insurer.** (Howard v. Friendly Society, 1886, 54 L. T. 644.)

A creditor has an insurable interest in the life of his debtor, **to the extent of the debt**, because the chance of the debt being paid is reduced by the debtor's demise. (Anderson v. Edie, 1788, Park.640.)

An executor has insurable interest in the life of a person the continuance of whose life confers some right or interest on the estate. (Tidswell v. Ankerstein, 1791, Peake 151.)

A surety can insure the principal debtor's life, because he has the right to claim compensation from him after the creditor has recovered the amount of the debt from him (the surety).

**When should the Insurable Interest exist ?**

In a contract of life assurance it is essential that there must be insurable interest **at the time the policy is effected.** If there was no insurable interest when the policy was made, the policy could be regarded as a gambling policy. (Dalby v. Indian and London Life

Insurance Co., 1854, 15 C. B. 365.) So an assignee of a policy need not have insurable interest; the fact that the assignor himself had the insurable interest when he got the policy effected, is sufficient. (*Ashley v. Ashley*, 1829, 3 Sim. 149.) Insurable interest need not exist at the time of death. (*Dalby v. Indian and London Life Insurance Co.*, 1854, 15 C. B. 365.)

A creditor can, on the demise of the debtor, on a policy taken on the debtor's life, recover the amount of the debt due to him from the debtor, and it is no defence for the insurer to plead that the debt has been diminished, because in a life assurance policy it is not necessary that the insurable interest should exist at the time of death of the person whose life has been insured; it is sufficient that there was insurable interest at the time the policy was entered into.

### KINDS OF POLICIES OF LIFE ASSURANCE

There are various kinds of life assurance policies. The main ones are: (1) the Endowment Assurance Policy, (2) the Whole Life Policy, (3) Joint Lives Policies, (4) Policies for the benefit of Children, (5) Policies for payment of Annuities.

We have also what are known as (i) short-term policies, (ii) limited payment policies, (iii) ascending-scale policies, (iv) indisputable policies, and (v) sinking fund policies.

#### The Endowment Policy

The Endowment Assurance Policy is one in which the assured is to be paid a specified sum of money on his survival to a stated age (like 60, 65, 70), or, in case of his demise earlier, the money is payable to his nominee or heirs, as the case may be.

#### The Whole Life Policy

The Whole Life Policy is one in which the amount of insurance is payable only in the event of death—not before death. The amount is payable to the nominee or the heirs, as the case may be.

#### Policy on Joint Lives

Policies on joint lives are very useful in case of firms. A policy on the joint lives of partners of a firm ensures the continuance of the partnership. Say, a policy is effected on the joint lives of A and B, partners in a firm. If one of these partners passes away, there may be a taking out of the capital of the firm the amount payable to his estate. But in an insurance on the joint lives of the partners, the insurer will have to pay the amount taken out of the capital.

The premium, in the case of a joint lives policy is paid out of the partnership assets. If the partnership gets dissolved, the surrender value of the policy is distributable amongst the partners just as the other assets are.

### **Policies on Lives of Children—Industrial Policies**

Parents often insure the lives of their children at birth or at an early age. On their attaining majority or at any subsequent specified age such children can have the policy money paid to them.

The object of effecting such policies is that of providing one's children with good education or for a good start in life or in business, trade or profession. It may be that of giving good policies to children on their attaining majority, at reduced premiums.

We have also what are known as **Industrial Policies** taken out by parents on the lives of their children, as also by children on the lives of their parents.

### **Annuities**

Where the amount payable under a life policy is payable not in one sum, but by annual payments by the Company, the policy is said to be one for payment of annuities.

### **Short-term Policies**

These are policies for a short period or term. Unlike the whole-life policy, the money payable on it is payable at a shorter period.

### **Limited Payment Policies**

Limited payment policies are those in which the duty to pay the premium ceases after the stipulated period of time-after payment of the agreed number of premiums.

### **Ascending-Scale Policies**

These are policies in which the amount payable as premium increases—as per the scale of increase.

### **Indisputable Policies**

These are policies which are not disputable by the insurer except on the ground of fraud practised by the insured.

### **Sinking Fund Policies**

Sinking fund policies are policies taken by Companies for redeeming their debentures or paying of the amounts due to debenture-holders:

### **Surrender Value**

After the payment by the insured (to the insurer) of premiums for three years (or more), the policy is said to have acquired a surrender value. The basis of the surrender value is the reserve value, i.e., the amount saved to provide for the payment of the policy. [Surrender value is the value allowed to an insured who surrenders his right, title and interest under his policy which he gives up to the insurer.]

### Refund of Premium

Unless there is a term in the policy that premium would not be refundable even if the policy is declared or becomes void, the Court may allow a return of the premium or a portion of it ; if the policy expressly says that premium will not be refundable, that clause in the policy will not be declared invalid. (Edinburgh Life Assurance Co.'s case, 1912, 1 K. B. 195.) If the assured had no insurable interest the policy is void, and the premium is not refundable ; this is as a rule so. (Pearl Life Assurance Co.'s Case, 1904, 1 K. B. 558.) Premium is not refundable where the underwriter has repudiated liability on the ground of fraudulent misrepresentation by the assured. If, however, the policy is avoided at the very start on the ground of a misstatement which is not fraudulent, then the premium is refundable.

### Assignment of Life Policies

**A life assurance policy can, under the provisions of the Insurance Act, be assigned by an indorsement on the back of the policy or by a separate deed of assignment ; but notice of such assignment must be given to the insurer by the assignee or by the assignor.**

A life assurance policy can be transferred or assigned, with or without consideration, either by the transferor's indorsement on the policy or by a separate document being executed by the assignor in favour of the assignee. The transferor or assignor may appoint an agent to sign on his behalf. There must be the signature of an attesting witness. The assignee or transferee shall acquire rights as against the insurer, from the date on which notice of the assignment or transfer is given to the insurer by or on behalf of the transferee or the transferor ; the transferee or the assignee can get no rights against insurer, till such notice is given to the insurer. In the case of more than one transfer or assignment, the assignments or transfers shall take priority in accordance with the date on which the notice to the insurer was given. Upon receipt of the notice, the insurer is bound to record the fact of transfer or assignment, and its date, and the name of the transferee or assignee ; upon receipt of the fee, and on request made by the transferor or the transferee or by the person giving the notice, the insurer must give the person concerned a written acknowledgment of the notice received. From the date **of the receipt of the notice**, the transferee or the assignee becomes the person entitled to benefits under the policy, but his rights shall be no better than those of the transferor or assignor.

### Nomination By Policy Holder

The holder of a life assurance policy may, at the time the policy is effected or at any time before the policy becomes mature for payment, nominate the person or the persons to whom the money

payable under the policy shall be paid in the event of his (the insured's) death. A nomination is either incorporated in the policy itself, or is effected by indorsement on the policy and notice of such indorsement to the insurer who then registers the same in the records relating to the policy. A nomination so made may be cancelled or altered at any time before the policy becomes mature for payment, by an endorsement or a further indorsement or by a will made by the insured. A nomination shall be deemed to be cancelled by a transfer or assignment of the policy.

### **“Assignment” distinguished from “Nomination”**

In an assignment the right, title and interest in the policy pass **to the assignee in his own right and for his own benefit**. But in a nomination, the death of the person whose life is insured entitles the insurer to hand over, **for the sake of convenience**, the money payable under the policy, to the person named in the policy as the nominee ; but such **nominee does not get in his own right the money ; he takes the money only as the constructive trustee** for the benefit of those entitled to the property of the deceased. In the case of an assignment, the assignee can sue on the policy though not a party to it ; but in the case of a nomination the nominee, as a rule, cannot sue on the policy in any case at least during the life time of the policy-holder.

### **Assignment to the Insurer and Nomination**

Under the Insurance Act, the assignment of a policy of life assurance to the insurer who bears the risk on the policy at the time of the assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, and the reassignment on the repayment of the loan, shall not cancel a nomination, but shall affect the rights of the nominee only to the extent of the insurer's interest in the policy.

### **Assignment by Insolvent**

The assignment by an insolvent of a life assurance policy is void as against the official assignee under section 55 of the Presidency Towns Insolvency Act. [In Thakurbhai Desai, 1943, 13 Comp. Cas. 41 (Ins.).]

### **Deposits and Working Capital**

Under the Insurance Act, insurers have got to deposit and keep deposited, the amounts prescribed by the Insurance Act. **The deposits are like trust moneys, and are for the benefit of the policy-holders.** The deposits are **part of the assets** of the insurer and are **not capable of being assigned, mortgaged or charged.** The deposits cannot be used for discharging any of the liabilities of the insurer, except liabilities arising out of policies issued by the insurer, unless



such liabilities (of the latter type) are discharged. The deposits cannot be attached in execution of a decree or order of a Court, except on a policy issued in favour of the insured, by the insurer, if the insured cannot realize his amount in any other manner.

The *raison d'être* of the deposit system is the protection of the policy-holders.

### **Policy Covering Death By Suicide**

A policy might even cover risk of death by suicide ; *e.g.*, in *Scottish Union Co. v. Nawab Roshan Jehan* (20 I. L. R. Luckn, 194), if the terms of the policy are so drafted as to give rise to such construction, *e.g.*, where the sum insured would be payable "at the end of a certain number of years or at death if earlier", and a letter written by the Company before the dispute arose stated that "death" in its policies was intended to cover death by suicide, by accident or at the hands of justice. But in *Beresford v. Royal Insurance Co.* (1939, 9 Comp. Cas. 1), it was held (and rightly so) that such policies were against the ethical sense—against public policy—and therefore void.

### **Evidence of Death**

A certificate from the Registrar of Deaths, or the Deaths Registration Office (of the community concerned), or the fact of the taking of a probate or of a succession certificate, or absence for seven years and more, can be considered as satisfactory or safe evidence of the fact of the death.

### **Payment of Money into Court by Insurer in certain Cases**

When with regard to any policy of life assurance maturing for payment an insurer is of the opinion that because of conflicting claims to the money payable under the policy or because of insufficiency of proof of title to the money under the policy or for any other adequate reason it is not possible otherwise for the insurer to obtain a satisfactory discharge for the payment of such amount, the insurer may apply to pay the amount into the Court within the jurisdiction of which is situated the place at which such amount is payable under the terms of the policy or otherwise.

A receipt granted by the Court for any such payment shall be regarded as a satisfactory discharge to the insurer for the payment of such amount.

## **FIRE INSURANCE**

### **What is a Contract of Fire Insurance ? — Its Nature**

A contract of fire insurance is a contract, usually in the shape of a policy, whereby one person known as the insurer agrees, in consideration of a sum of money called the premium, to indemnify, *i.e.*

hold free from liability and thus compensate, another person known as the insured, for any loss or damage to the insured property or the insured goods of the insured. The contract specifies the period during which the indemnity is to last and also the maximum amount to which the insurer can be held liable.

As already mentioned, a contract of fire insurance is a **contract of indemnity**—so that only the amount required to restore the insured to his original position can be recovered. (*Castellian v. Preston*, 1883, 11 Q. B. D. 401.)

It is a contract *uberrimae fidei*, i.e. one requiring utmost disclosure by the insured as also the insurer. (*Watchorn v. Langford*, 1813, 3 Camp. 422.)

### Insurable Interest

As in other types of insurance, there must be the **insurable interest** to support a fire insurance contract. The insured must have some **pecuniary** interest in the goods or property insured.

Insurable interest must exist **at the time the loss or damage takes place**. Thus a buyer or transferee or mortgagee of goods can sue on the policy if he has the insurable interest at the time of the loss or damage.

The owner of property possesses insurable interest in his property **to the extent of its value** ; so has the trustee who is the legal owner though he is holding the property for the benefit of the *cestui que* trust (beneficiary) ; a mortgagee can insure the property mortgaged to him ; a pawn-broker may insure pledges ; a common carrier can insure the goods in his possession as such carrier ; an insurer or underwriter can insure the risk or a portion of the risk, undertaken by him, with another insurer, for he has insurable interest in the property to the extent of his own liability by virtue of the original insurance.

### KINDS OF FIRE POLICIES

Like different types of life policies, we have a variety of fire policies. There is (1) the Specific Policy ; (2) the Average Policy ; (3) All-in-one Policy ; (4) the Floating Policy ; (5) the Valued Policy.

#### Specific Policy

**A Specific Policy** is a policy in which a specified sum is payable in the case of the loss reaching that amount, though the real value of the thing insured may be higher than the amount insured for.

#### Average Policy—Average Clause

When what is known as the average clause is inserted in the policy, the policy is called Average Policy. The average clause provides that the insured shall, where the property is insured for a lower

sum than its real value, bear a rateable portion of the loss. This clause is always inserted when two or more risks are covered by the same (single) amount. In other cases also this clause is usually inserted. If the insured has insured for the full value of the property, then the Average clause does not apply; but where the insurance is for a lower amount than the full value or market price, then the insured would get proportionately less, and not the whole amount insured for.

### **All-in-one Policy**

It is a policy which combines insurance against fire, burglary theft, third party losses etc.

### **Floating Policy—Floaters**

A Floating Policy is one concerning property in different places. A **floater**, as a floating policy is usually called, is always subject to the average clause. The policy is often in respect of goods in a warehouse awaiting removal by shipment or by sale.

### **Valued Policy**

A Valued Policy is one in which the amount payable in case of loss has been fixed, at the time the policy is effected, to a definite amount. Such policies, however, have been legally challenged because a contract of fire insurance is one of indemnity; so a sum larger than what is a reasonable indemnity cannot be claimed.

### **Risks Covered by Policy**

Much depends on the terms of the policy. Loss caused by the negligence of the insured is included. (*Harris v. Poland*, 1941, 1 K. B. 462). A loss caused to property which is actually destroyed to prevent the spread of the flames is covered by the policy. (*Ahmedbhai v. Bombay Fire Co., Ltd.* 29 T. L. R. 96.)

### **Insurance against Loss of Profits/Rents**

Fire policies often include loss of profits, rents and such other consequential losses. Sometimes an **all-in-one** policy is issued, combining insurer against burglary, theft, third-party risks etc. Where the insurer pays the insured for the loss of profits, rents, yields, the income-tax officer can consider it income of the insured though not distributed; and such income is liable to taxation. (*Raghuvanshi Mills Ltd. Bombay Case—1949*).

### **Reinstatement Clause**

As a substantial sort of preventive to fraudulent devices by the insured, it is usual to insert a clause called the Reinstatement Clause, whereby the insurer can, instead of having to pay for the loss in cash, reinstate the property lost or damaged.

### **The Doctrine of Subrogation**

After the insurer has indemnified the insured and paid to him a reasonable amount to re-instate him in his original position, **the insurer is entitled to all that remains of the property or goods destroyed ; the insurer is also entitled to all rights by way of suit against any outsider** whose negligence, act or default caused the loss, in the same way as the insured would have been entitled if he had not been indemnified by the insurer. All the rights, title and interest of the insured now get transferred to the insurer. In other words, the insurer is subrogated to all the rights and remedies, at contract, or in tort, of the insured, regarding the property or goods lost, against any outsider whose act, default or negligence caused the loss. (*Castellian v. Preston*, 1883, 11 Q. B. D. 380.)

If the insured has already received any benefit from any outsider, in respect of compensation for the loss, he must pay over all that to the insurer, after the insurer compensates him for all the loss suffered by him. (*Castellian v. Preston*, 1883, 11 Q. B. D. 380 ; *West of England Insurance Co. v. Issacs*, 1897, 1 Q. B. 226 ; *Stearns v. Village Main Reef Co.* 21 T. L. R. 236.)

In *Darrell v. Tibbits*, 1880, 5 Q. B. D. 560, a person entered into a contract of sale of immovable property. He purchased a house from another who had insured it. The contract of sale, however, had no reference made to the fact of the insurance. Before the sale could actually be completed the house got burnt down, and the owner (the seller) recovered compensation from the insurer. After this he got the purchase money from the buyer. The seller of the house was held bound to pay over to the insurer what he (the seller) had recovered as purchase money from the buyer, because of the application of the doctrine of subrogation.

### **Assignment of Fire Policies**

A fire policy can be assigned by endorsement on the back of the policy, or by a separate deed of assignment. The insurer must be given notice of the assignment. [For Forms of assignment, see pages 279, 280.]

## **MARINE INSURANCE**

### **What is Marine Insurance? State the Characteristics of a Marine Insurance Contract**

A marine insurance contract is a contract, usually in a policy, whereby a party, called the marine underwriter, agrees to compensate another party, called the insured, for any loss or damage to his goods or ship, or for some marine loss or damage, during the pendency of the voyage, or during the period of the policy, or otherwise, in consideration of a sum of money called the premium, provided

the loss or the damage is caused directly and naturally by a peril insured against under the policy of insurance or the terms of the contract.

### Contract Uberrimae fidei

A contract of marine insurance is a contract *uberrimae fidei* i.e., one in which the utmost good faith is required of both the parties who are **mutually** under a **duty to disclose** every **material** and **relevant** fact within knowledge. (*Blackburn v. Vigors*, 1887, 12 A. C. 531.)

### Contract of Indemnity

A marine insurance contract is one of **indemnity**, i.e., a contract in which the insured would get his *status quo*, and nothing more. (*Castellian v. Preston*, 1882, 11 Q. B. D. 380.)

### Insurable Interest

The insured must have insurable interest in the property or the goods insured, i.e., he must have some **pecuniary** interest in the same, e.g., as the owner, or as the trustee, or mortgagee. A mortgagor has insurable interest to the full extent of his interest in the property or the goods insured. The person who has lent money on *botticary* or *respondentia* bond can also insure the property to the extent of the loan amount. A person paying advance freight could be said to have insurable interest to the extent of the amount payable as such freight, because such freight is not refundable even in case of loss of the goods. A bailee is interested in the proper keeping of the property, and he can therefore insure the goods bailed to him, though he is not the owner thereof. The master of the ship has pecuniary interest to the extent of his salary and disbursements properly and lawfully made; so also the members of the crew have insurable interest for their wages. Shippers have insurable interest in regard to the subject matter regarding which they have the right to exercise a lien for money advanced by them. An underwriter who has undertaken too heavy a responsibility to be borne by him alone, can underwrite the whole or a portion of his own risk with another underwriter. This is called **re-insurance**.

It is important to note that though the person wishing to sue on a marine underwriting policy might not have any insurable interest when the policy was effected, he must have insurable interest **at the time the loss or damage took place**.

### Slip

Before a policy is issued, the insurance agent procures a "**slip**" (also known as "**memo**") in which are given the particulars of the proposed insurance. The slip when signed by the insurer shows that

he will issue the policy, though he is not compellable at law to do so. It is only the properly stamped policy that gives the right of suit. The slip does not give the right of suit.

### Cover Note

A **cover note** is a document issued by the insurer for giving the benefit of the insurance to the insured during the period between the agreement to issue the policy and the actual issue of the policy.

A **properly stamped** cover note gives a right to sue for specific performance. (*Bhugwandas v. Netherland Assurance Co.*, 14 A. C. 83.) But the cover note is not to be considered as equivalent to an agreement to issue the policy. (*Surajmal v. The Triton Insurance Co.*, 52 Cal. 408.)

### Effect of an Unstamped Policy

An unstamped policy cannot be sued upon. In order that the insured may sue, the policy must be properly stamped.

When by a bill of lading, a Company, for an increased payment, takes upon itself all the risks concerning goods while on board a ship or vessel, the document is not a policy but only a contract of marine insurance, and is not therefore liable to be stamped as a marine policy. (In the Matter of a Reference under the Indian Stamp Act, 1899, 1903, 30 Cal. 565.)

## KINDS OF MARINE INSURANCE POLICIES

There are different kinds of marine insurance policies. We have what is known as (1) the "**valued**" policy, (2) the "open" or "unvalued" policy, (3) the "voyage" policy, (4) the "time" policy, (5) the "mixed" policy, (6) the "floating" policy, (7) the "P.P.I." policy, *i.e.*, the policy proof of interest, (8) the gambling or wagering policy.

### The "Valued" Policy

A valued policy is a policy in which the value of the property or the goods insured is fixed at the time the policy is made, so that in case of loss or damage it would be easy to calculate the amount payable as indemnity.

### The "Open" or "Unvalued" Policy

The "open" or "unvalued" policy is a policy in which the value of the subject matter insured is not fixed at the time the policy is made but is left to be determined when the loss or damage actually takes place.

### The "Voyage" Policy

The "Voyage" Policy is one in which the risk is to endure during a specified voyage, *e.g.*, Bombay to China.

### The "Time" Policy

It is a policy in which the risk is to last during the time fixed by the policy. For example, an insurance from 1st January 1950 to 31st March 1950" is that of a time policy.

### The Continuation Clause

The continuation clause is a clause in a Time Policy whereby the policy is continued (even after the expiry of the time) till the port of destination.

### The "Mixed" Policy

The "mixed" policy is one in which the risk endures during a particular voyage for a specified period. For example, a policy in which the risk is to last from Bombay to China for three months.

### The "Floating" Policy

The "floating" policy is a policy in which the name of the ship is not mentioned at the time the policy is made, but is to be subsequently declared by an indorsement on the policy.

### The "P.P.I." Policy also known as "Honour" Policy

The "P.P.I." policy (the policy proof of interest) is one in which the insured has no interest in the subject matter insured. It is legally a void policy; (Re London County.....Office, 1922, 2 Ch. 67); but in practice and out of honour, the insurers who issue such policies abide by their liability to such policy holders. Such policies are, therefore, sometimes, called "honour policies".

### The "Gambling Policy"—"Wagering" Policy

A "gambling" or "wagering" policy is one in which the insured has no insurable interest. Such a policy is void and of no effect, and, if made, the insurer can repudiate all liability thereon. It is opposed to what is known as the the "interest" policy in which the insured has some pecuniary interest in the subject matter insured.

### Form of Lloyd's Policy

BE IT KNOWN THAT.....and or as agent as well in (his) own name, as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in all ; doth make assurance and cause..... and them and every of them to be insured, **lost or not lost, at and from** .....upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel, called the.....whereof is master under God for this present voyage,.....or who-

soever else shall go for master in the said ship, or by whatsoever other name or names the said ship or the master thereof is or shall be named and called ; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship. . . . . upon the said ship. . . . . and so shall continue and endure, during her abode there, upon the said ship, etc., and further, until the said ship, with all her ordnance, tackle, apparel etc., and goods and merchandises whatsoever, shall be arrived at . . . . . ; upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises, until the same be there discharged and safely landed ; and it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to, and **touch and stay** at any ports or places whatsoever, . . . . . without prejudice to this Insurance.

THE said ship, etc., goods and merchandises, etc., for so much as concerns the assured, by agreement between the assured and the assurers in this policy, are and **shall be valued at**. . . . .

TOUCHING the adventures and perils which we the assurers are contented to bear and to take upon us in this voyage, they are of the **seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments, of all kings, princes and people of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes** that have and shall come to the hurt, detriment or damage of the said goods and merchandises, and ship, etc., of any part thereof.

AND in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants and assigns, **to sue, labour, and travel for**, in and about the defence, safeguard and recovery of the said goods and merchandises and ship, etc., or any part thereof, without prejudice to this Insurance ; to the charges whereof we the assurers will contribute, each one according to the rate and quantity of his sum herein assured.

AND it is specially declared and agreed that no acts of the insurer or insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

AND it is agreed by us, the insurers, that this writing, or policy of assurance, shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street or in the Royal Exchange, or elsewhere in London.

AND so, we the assurers are contented and do hereby promise, and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their heirs, executors, administrators, assigns, for the true performance of the promises.



CONFESSING ourselves paid the **consideration** due unto us for this assurance by the assured at and after the rate of.....

In witness whereof we the assurers, have subscribed our names and sums insured in.....

**N.B.**—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded ; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under 5 pounds per cent. ; and all other goods, also the ship and freight, are warranted free from average under 3 pounds per cent., unless general, or the ship be stranded.

## EXPLANATION OF THE VARIOUS CLAUSES OF THE LLYOD'S POLICY

### The “Parties” to the Policy

The policy mentions the names of the parties, *viz.*, the insurer and the insured. And the words (in the policy) “as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in all” are sufficient to protect all persons who had insurable interest in the subject matter insured at the time of the making of the policy as also all persons who are interested in the subject matter even only at the time of the loss, by having become transferees or having become subsequently interested in the property, during the duration of the risk. But it has been held that the above-mentioned words (in inverted commas) in the Lloyd's policy do not cover a case in which it is proved, to the satisfaction of the Court, that the person claiming the benefit under the policy was not within the contemplation of those who got the policy effected ; he could not be allowed the benefit under the policy. (*Boston Fruit Co. v. British & Marine Insurance Co.*, 1906 A. C. 336.)

### The “Lost or not Lost” Clause

Under the “Lost or not Lost” Clause, the contract of insurance which would have been otherwise invalidated by virtue of the Indian Contract Act (due to a mistake of fact common to the mind of each of the parties to the transaction), is kept valid. A policy containing such words specifies that both the parties undertake to be liable, even if there be a bilateral mistake, and even if the goods have been lost before the date the policy is made or have reached their destination safe and sound before the policy is effected. The fact that the goods have already been lost or that they have reached their destination safe does not invalidate the contract of marine insurance, provided both the parties were unaware of the fact and there is the “lost or not lost” clause. If one of the parties was aware of the fact, and kept quiet, his silence would be regarded as fraud on the other party. Thus if at the time of the making of the policy

the insured was aware that the goods had been cast of, and under the guise of "the lost or not lost" clause, he attempted to get the benefit of the policy, by paying the premium, then not only would he lose the entire premium but also would not get anything whatever on the policy which the insurer could wholly avoid on the ground of fraud of the insured. Likewise if the insurer knew at the time the policy was made that the goods had reached their destination safe and still pocketed the premium, pretending not to know anything about the goods, then he is bound to return to the insured the whole of the premium, on the ground of total failure of consideration. The premium was paid for running the risk ; now if the insurer really never did run any risk, he must return the premium.

### **The "From" Clause**

The "From" clause makes the risk start while the ship sets sail, and not while she is in the port.

### **The "At and From" Clause**

Under the "At and From" Clause, the risk starts not from the time the ship sets sail, but right from the time she has entered the specified port. In a policy where the risk starts **from** a particular port, the insurer is not liable for any loss or damage while the ship is at the port ; the insurer is liable for any loss or damage arising after the ship has started sailing from the port. But in a policy where the risk is to start "at and from" a particular port, the insurer can be held liable even for any loss or damage, arising out of a peril insured against, even while the ship is in the port (has not started sailing).

### **The Master of the Ship**

The policy states the name of the ship and the master for the time being. The words "whosoever shall go for master in the said ship" show that even if the originally named master be unable to take charge or to carry on, then a substitute would be the master of the ship during the voyage.

### **DURATION OF RISK**

**"Until she hath moored in anchor twenty-four hours in good safety"**

For goods which are insured "**from** the loading thereof", no risk starts till the goods have been loaded ; for any loss or damage to goods while they are being loaded, *i.e.*, from the shore or the harbour to the ship, the insurer, in such a case, cannot be held liable.

After the ship has reached her destination, the insurer remains liable until the ship "hath moored at anchor twenty-four hours in good safety".

Where the risk is to last till the goods are “safely landed”, the goods must be landed in the usual manner within a reasonable time after the arrival of the ship at the port of destination and discharge. (*Harry v. Royal Exchange Co.*, 1801, 2 Bos. 2 P. 430.)

### “Risk of craft to and from a vessel”

The words “including risk of craft to and from a vessel” usually appear in a policy. These words protect the insured against the risk of damage or loss while the goods are loaded or unloaded by lighter. Often the clause is made to apply also to cases of loading or unloading by craft.

### The “Touch and Stay” Clause—Deviation, how far allowed

The policy mentions the ports, where the ship can touch, and the period of time for which she can stay at each such port. The policy may also give the ship the liberty to touch and stay at any ports or places whatsoever, but even where such liberty is given, the master can only stay at the **usual** ports in the ordinary and customary course of the voyage.

It is **an** express term of the contract of marine insurance that the ship shall only touch at such ports as are by the policy allowed and there not longer than for the appointed time, *i.e.*, the time fixed by the policy. Even when the policy does not prescribe any particular route or the ports where the ship can touch and stay, it is an **implied term** of the contract or the policy that the ship shall take and follow the usual and customary route, and shall touch at such ports as it is customary for ships on that voyage usually to touch, and that she will stay there not longer than for the customary period of time. If the ship takes a different route or touches ports which she is not allowed under the policy to touch, or, in case the policy is silent on the point, the usual ports, then there is a deviation.

The effect of deviation is that because of the breach of the warranty the insurer gets discharged from liability on the marine policy, unless the deviation was justifiable under the circumstances.

### When is Deviation Permissible ?

A ship is permitted to deviate from the prescribed voyage, or when no voyage has been prescribed by the policy, the usual route, under the following circumstances :—

- (1) When to go ahead on the prescribed route or the customary route would be precarious to the entire enterprise, *e.g.*, there is rough weather, storm, cyclone ; in other words, when the circumstances are beyond the control of the master and the mariners.
- (2) When the master of the ship finds that in order to make the ship seaworthy, she must be rushed to the nearest port of refuge.

- (3) When the deviation has to be resorted to flee from pirates or the enemies of the nationality to which the ship belongs.
- (4) To save human life in danger on board the ship, *e.g.*, for giving a passenger or a member of the crew some surgical or medical help not available on board the ship.
- (5) To save human life on board another ship in danger, or to save a ship-wrecked person or persons.
- (6) To save human life on board a cargo ship, or a ship containing animals but not so as to wait and save the animals also [for the law regards animals as mere goods and does not (it is a pity) care to save animal life or allow such saving by a ship]. Any deviation made with a view solely to saving goods (including animals, for animals are goods), would be regarded as unjustifiable. (*Scaramanga v. Stamp*, 1880, 5 C. P. D. 295). On the other hand, under the Carriage of Goods by Sea Act, a carrier who deviates even for the purpose of saving property is excused from liability for loss or damage resulting from the deviation.
- (7) When the deviation has been caused because of barratry (a wrong-doing) by the master or a member of the crew, provided barratry is a peril insured against (as in the Lloyd's policy).
- (8) For any other reason expressly allowed by the policy.

Any delay in carrying on with the voyage, or even in starting with the voyage, would render the underwriter discharged from all liability under the policy. (1832, 1 Bing. 122).

### Sea Perils

Perils of the sea are those perils which are likely on a sea-transit, *e.g.*, sea-water, stranding, collision, cyclone, storm, fog, rough weather, and such other likely perils, but not what might happen accidentally or casually. If sea-water entered the ship due to causes inherent to the ship, *e.g.* wear and tear of the ship, the peril cannot be called a sea-peril. But on the other hand, if the water entered by reason of holes made by rats on the ship or any part thereof, the water could be regarded as the effective cause. (*Hamilton v. Pandorf*, 1887, 6 Asp. M. L. C. 212). But damage directly caused by rats is not sea-peril.

### THE "INCHMAREE" CLAUSE

**How far does the Rule in *Thames & Mersey Marine Insurance Co. v. Hawilton Fraser & Co.*, 1887, 12 A. C. 484 apply to Marine Insurance Contracts? Modifications of the rule by the "Inchmaree"**

## Clause

The inclusion of the "Inchmaree" Clause (named so from the case of the steamer "Inchmaree"), makes the insurer liable for loss or damage arising even otherwise than out of a sea peril. Otherwise by the decision in the case of the ship "Inchmaree," it was held that the insurer could not be held liable for what was not really a sea peril. In the case of the "Inchmaree," the ship was lying at anchor off the shore, and the donkey engine was pumping water into the boilers. By the negligence of an officer a valve had been kept closed whereas it ought to have been kept open ; as the result of the negligence water was forced into the oil chamber and split the donkey pump. It was held that the loss was not a sea peril or a peril similar to a sea peril and was not therefore covered by the policy concerned. The insurers were held immune from liability. (*Thames & Mersey Marine Insurance Co. v. Hawilton Fraser & Co.*, 1887, 12 A. C. 484.)

Since the decision in the "Inchmaree" Case, insurers and insured now by mutual agreement usually put in a clause in the policy whereby the insured is protected, and the insurer is rendered liable, even in cases of loss or damage arising out of what is neither a sea peril nor a peril *ejusdem generis* (of the same kind) to a sea peril. Such clause is called the "Inchmaree" Clause.

### The "Fire" Clause

Unless the fire is the result of an act, default or negligence of the insured or his agent or servant, the insurer is liable by virtue of the "fire" clause. In *Gordon v. Remington*, (1807, 1 Camp. 123), it was held that the insurer could be held liable even when the master caused the fire deliberately, **but so as to avoid the enemy capturing the ship**. And in *Midland Insurance Co. v. Smith*, (1881, 6 Q. B. 561), it was held that the insurer could be held liable for a fire caused deliberately by a person other than the insured, provided there was no collusion or connivance.

### The "Piracy" Clause

Loss or damage caused by pirates, rovers, marauders, who plunder the ship or the cargo, is covered by the policy. Even loss or damage caused by mutinous passengers, members of the crew or rioters attacking the ship from the shore, is covered by the policy.

### The "Robbery" Clause

Loss or damage caused by somebody outside the ship or by riotous mariners or passengers is covered by the policy ; but clandestine theft by a member of the crew or by a passenger is not covered.

### Jettison

Jettison, *i.e.*, throwing overboard useful and valuable (as opposed to useless or valueless) goods, the casting away or cutting of sails, masts, riggings, apparels, for lightening the weight of the

ship and rushing her to the nearest port of refuge to make her seaworthy there, is covered by the policy. Where goods are thrown overboard it must be shown that the goods were not worthless—fit to be thrown away. There must be some *bona fide* loss caused by jettison. Even if the cargo was carried on the deck, the insurer is liable for loss caused to it by jettison, if by custom or because of the very nature of the cargo it was or it had to be carried on deck; otherwise the cargo must not be carried in an insecure place like the deck, if the loss caused by jettison is to be recoverable from the insurer. (*Milward v. Hibbert*, 1842, 3 Q. B. 120).

### **Letters of Mart—Letters of Marque**

Letters of Mart, also known as Letters of Marque, granted by a Government, empower the holders to make reprisals on the shipping of an enemy who had inflicted loss or damage to the shipping of the country the government of which has granted the letters of Mart.

When the enemy country in turn grants the right to fight such reprisal, the grant by the enemy State is called Letters of Countermart.

### **Letters of Countermart**

Letters of Countermart are granted by the enemy country's government to reply against the Letters of Mart granted as reprisal.

### **“Surprisals and Takings”**

These are risks attaining to capture and arrest by foreign States or by the enemy country.

### **Arrests, restraints and detainments of all Kings, Princes and People**

When an arrest, detainment, blockade or embargo is made or imposed, the ship is said to be detained or arrested by a foreign government. By reason of breaking out of a war, the ship has got to forsake her voyage, in which case there is what is known as a restraint by a government or by princes. The restraint must be real, and actually in existence. A mere apprehension of a restraint or a possible or probable restraint will not be regarded as a restraint of princes. (*Watts & Co. v. Metani & Co.*, 1917, A. C. 227).

### **The “Barratry” Clause**

Barratry means and includes all wilfully wrongful acts done by any member of the crew or the master, provided the master, or the owner of the ship, did not connive in the act. Scuttling a ship by boring holes in it, burning a ship, smuggling, trading with the enemy, selling away the ship and cargo and misappropriation of the sale proceeds, are some of the examples of barratry—for which the insurer is liable whenever barratry is a peril insured against.

### The "All Other Perils" Clause

The words "all other perils, losses and misfortunes", included in the Lloyd's policy, do not mean any and every loss whatever; the loss must be *ejusdem generis*, i.e., of the same kind as the sea perils or the other losses and perils actually specified in the policy. (Samuel & Co. v. Dumas, 1924, A. C. 431).

### The "Sue, Labour and Travel for" Clause

Under the "sue, labour and travel for" clause in the policy, the insured is allowed to stop the ship, lower down barges and set mariners to sue, labour and travel for the goods which are expected to be in the vicinity, having fallen overboard accidentally. If the goods are found, then there is so much less of liability for the insurer. So, in consideration of a sum of money payable to the insured, the insured agrees to labour and retrieve the goods.

### The "F. C. and S." Clause

The F. C. and S. Clause, i.e., the Free of Capture and Seizure Clause, in the policy, protects the insurer, especially in times of war, from liability in case the goods are seized or captured by enemy action.

### The "Memorandum" Clause (The N. B. Clause)

The "memorandum" or the N. B. (the *nota beni*) clause is the clause in the policy, being added at the foot of the policy, whereby the underwriter is excused from liability on minor items of a perishable character, and in some cases, his liability is limited or minimised by the terms of this clause in the policy.

With regard to articles of the most perishable character, e.g. salt, flour, corn, fish and seed, the underwriter is not to be held liable on a partial loss or damage. He is however, liable for general average loss, or in case the ship is stranded.

On articles like sugar, hemp, tobacco, flax, hides and skins, the underwriter is not liable on a partial loss or damage, unless the damage is equivalent to or more than the specified per cent. of the value of the articles lost or damaged. In Lloyd's policy it is five per cent.

So far as the ship, freight and the cargo are concerned, partial losses or damage do not make the insurer liable, unless the damage or the partial loss is to the extent of three per cent. of the value of the thing lost or damaged. By Lloyd's policy the percentage is three; but in a policy it is open to the parties to contract to the contrary. If the ship is stranded, or if there is a general average loss, the insurer is liable.

### The F. P. A. Clause

The F. P. A. Clause, *i.e.*, the free of particular average clause, which is inserted in the policy, is an extension of the Memorandum or the N. B. Clause. Under this clause, the marine underwriter is excused from liability for any minor damage or loss to any single item—particular average. But if the loss or damage, though minor and to a single item, has been caused by stranding of the ship or the craft or by its being burnt down or sunk, the underwriter is liable; so also is the underwriter liable if the loss is caused by collision. In the case of total loss of any package during transshipment, the underwriter remains liable.

### The F. A. A. Clause

The F. A. A. (free of all average) Clause exempts the underwriter from liability from **all** average, *i.e.*, not only on particular average but also on general average.

### The “Running Down” Clause

When by the negligence of its master or member of the crew, a ship collides with another ship or craft, there is what is known as the “running down” case. In such a case the owner of the negligent ship is liable to the owner of the other ship which suffered loss or damage. If the policy includes the “running down” clause, the insurer is liable to compensate the owner of the negligent ship for any damages he had to pay to the owner of the other ship. See also *Fenwick v. Merchants’ Marine Insurance Co.*, 1915, 3 K. B. 290.

### Warranties—Express and Implied

What is a warranty in a contract of insurance? A warranty under the Sale of Goods Act has a different meaning from that of the term understood under the law of insurance. In a contract of insurance, a warranty means a stipulation, in the nature of a condition, being so **essential** to the fulfilment of the contract that its breach causes an irreparable loss or damage to the other party who can therefore avoid his liability under the contract.

In a contract or policy of insurance a warranty may be **express** or **implied**.

An **express** warranty is a warranty which **the parties have** by consent **included** in their contract. But an **implied** warranty means a warranty **implied to be in the contract**, though the parties have not included it themselves. The **law includes** such warranty in the contract.

**The following are the main examples of or types of express warranties in a contract or policy of marine insurance :—**

- (1) Warranty that the ship is fit for the voyage she is undertaking;



other underwriter. Such insurance by the underwriter with another underwriter is called re-insurance. There is insurable interest in such re-insurance, because the insurer has pecuniary interest in the subject-matter already insured by him on the original insurance, to the extent of his own liability as underwriter on the original insurance. The consideration for the re-insurance premium is paid by the underwriter to the re-underwriter on the re-underwriting.

Usually the liability of the re-insurer is based on the same terms and conditions as in the original policy issued by the original insurer. But the re-insurance is different from the original contract, and there is no privity whatever between the re-insurer and the original insured. The original assured cannot sue the re-insurer, but can have his remedy only against the original insurer who in turn can claim to be indemnified by the re-insurer.

If any compromise or arrangement is entered into between the original assured and the original insurer the re-insurer is entitled to such benefit, because a contract of marine underwriting, whether contained in a policy, or otherwise (as in a bill of lading) is a contract of indemnity. (*British Dominions General Insurance Co. v. Dudes*, 1915, 2 K. B. 394). And the re-insurer is also entitled to the benefits of subrogation, because the contract is one of indemnity, and equity demands that the re-insurer should also get the benefit of subrogation to the extent to which he has helped the insurer. (*Assicurazioni Generali di Trieste v. Empress Assurance Corporation*, 1907, 2 K. B. 814).

## Double Insurance

### Under-Insurance—Over-Insurance

When the insured, finding that he has under-insured, *i.e.*, insured for a lesser amount than his real loss in case the goods are lost, goes to another insurer to insure for the remaining amount so as to constitute a full or sufficient insurance, the insurance with the other underwriter brings about what is known as "double insurance." Double insurance means insurance **with two or more underwriters on the same risk and the same subject matter, but for different amounts, so as to constitute a complete insurance.**

In the case of double insurance, *i.e.*, insurance with two or more insurers, the insured can, in the absence of a fraudulent purpose or intention, recover on any one or more or all of the policies till he gets sufficient indemnity to re-instate him to his original position. If, however, by recovering on all the policies, or on two or more of the policies, the insured has recovered a higher amount than what is really necessary to compensate him for his loss or damage, the insured cannot keep for himself the excess; **he holds the excess, as a constructive trustee for the benefit of the insurers with whom he has insured the same subject-matter, the same risk and same interest.**

### Contribution between Insurers of the same Risk

The insured can sue any of the insurers, in case of double insurance, and such insurer is liable to compensate him for the loss subject to the limit of his liability. In such a case, the insurer who has been made liable for the full amount can recover contribution from the other underwriter or underwriters.

Where the insured has insured to such an extent that the amount really payable to him as his indemnity would be less than the amount for which he has insured, the case is said to be one of **over-insurance**.

### Losses—Total and Partial

A loss may be (1) a **total** loss or (2) a **partial** loss. A **total loss** takes place when the subject-matter is actually destroyed, so as to be no longer answerable to the name by which it is known, or when the thing, though not so destroyed, is irretrievably lost, or so damaged that the cost of the repairs would exceed its value after the thing is repaired. Who would be so foolish as to spend a lot to find out a thing which it is very difficult to retrieve, or to spend a shilling to get back the penny that has been thrown overboard. A thing therefore which is, so to say, irretrievably lost can be given up as **constructively** lost; so also a thing so heavily damaged as to require a higher amount for its repairs than its value after it is repaired can wisely be given up as totally perished, though actually it is not totally lost; in such cases the loss is called **constructive** total loss. On the other hand, when the thing has actually totally perished or been so damaged as no longer to go by its name, the loss is called an **actual** total loss. (*Cambridge v. Anderson*, 1824, 2 B. & C. 691.)

A **partial loss** takes place when the subject matter insured is partially lost or damaged, or when there is a loss in the form of an obligation to pay towards general average contribution.

A loss, originally total, may become, by subsequent circumstances or facts, a partial one, *e.g.* as long as there is a restraint of princes or an embargo the loss is a total loss—a constructive total loss (*British & Foreign Marine Insurance Co. Ltd. v. S. Sandy & Co.*, 1916, 1 A. C. 650)—but becomes a partial loss as soon as the restraint is removed or the embargo lifted. (*M'Carthy v. Abel*, 1804, 5 East 388.)

### The Ship's Protest

It is a document sworn before a notary public, giving an account of the loss, and it must be accompanied by a claim of the assured, the bill of lading or charterparty; and with the policy it must be forwarded to the insurer.

### Settlement of Claims—Adjustment of Losses

Adjustment of losses or settlement of claims is usually done by brokers. After a loss has taken place, the broker adjusts the loss and gets the same settled by the insurer. **Average adjusters**, *i.e.*, experts who can calculate the loss and adjust the claim can be engaged, if necessary. The term “settled” is then prefixed and the policy is indorsed with the determined percentage of the loss. The underwriter or underwriters then initial the policy, showing thereby that he they accept the percentage determined by the brokers or the average adjusters ; but if the underwriter has any objection to the percentage so determined he would refuse to initial the policy. The process of determining the loss, in this fashion, is called the process of adjustment of losses or settlement of claims or settling the claim. If a claim is resisted or disputed, a suit may be brought by the insured against the underwriter or underwriters concerned, and the Court would then adjust the loss.

**Subject to a contract to the contrary, the rules for determining the amounts payable are as follows :—**

In the case of ship, if the loss is partial, the insurer has to pay the costs of the repairs (being reasonably incurred), less the customary deductions. Unless the ship was on her maiden voyage (first voyage) the underwriter will have to pay two-thirds of the costs of the repairs, one third being deducted for the benefit obtained by the insured in getting new parts in place of the used ones—wear and tear being considered. In case of a ship on her first voyage the deductions, of course, are not allowable, and, as a rule, the underwriter has got to pay the full amount, *i.e.*, the total expenditure, provided reasonably incurred. (*Pirie v. Steele*, 1837, 2 M. & Rob. 49.) If the insured has not incurred any expenditure, or has effected partial repairs, the underwriter can be held liable to compensate the insured for the depreciation of the value of the ship, not exceeding what would be reasonably required for the repairs, and the sum actually incurred where he has incurred any expenditure. But in any case the sum recoverable cannot be more than the sum insured.

In the case of a total loss of the ship, the insurer has got to pay the sum fixed at the time the policy was effected, if the policy be a valued policy. If, however, the policy is an unvalued or open policy, the underwriter can be called upon to pay the insurable value of the ship at the start of her voyage, plus stores, outfit, machinery, provisions, advances of wages and all the other necessary costs and expenses for making the ship fit for the voyage. Premium and charges of insurance are included.

In the case of goods, if the loss is a partial loss the underwriter is liable, in the case of a valued policy, to pay such proportion of the sum fixed under the policy as the insurable value of the part lost bears to the insurable value of the whole.

In the case of a partial loss of goods, under an unvalued or open policy, the underwriter will have to pay the insurable value of the part lost, determined as in a total loss.

Where the whole of any part of the goods has been delivered damaged at the port of destination, the underwriter has got to pay, in a valued policy, such proportion of the sum fixed by the policy as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value. And, if the policy, in such a case, be unvalued or open, the insurer has to pay such proportion of the insurable value as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value.

In the case of a total loss of goods, the underwriter has, in the case of a valued policy, got to pay the amount payable under the policy and so fixed at the time the policy was made. And, in such a case, if the policy be an unvalued or open policy, the underwriter has to pay the insurable value. The insurable value means and includes the invoice value of the goods at the place of loading and the expense of and incidental to shipping and the insurance premia and commission amounts.

In the case of successive losses, unless the policy otherwise mentions, the insurer is liable for such losses, even though the total amount of such successive losses may exceed the sum insured, because the underwriter has undertaken to indemnify the insured against all losses incurred by him during the period of the risk under the policy. But if there are successive losses, **so that a total loss follows a partial loss**, the insurer can be held liable only on the total loss. (*British and Foreign Insurance Co. v. Wilson Shipping Co.*, 1921, 1 A. C. 188.)

### The Doctrine of Subrogation

In the case of a partial loss of the subject matter insured, the insured retains the goods, has them repaired and, as seen already, gets compensation for the cost of the repairs, or, if he has not repaired, then compensation for the diminished value of the goods. He does not have to give up the goods to the insurer; the goods are retained by the insured. But when the loss is a total loss—whether actual or constructive—the doctrine of subrogation applies, i.e., after the insurer pays up the insured for the total loss, the insurer becomes entitled and subrogated to all that remains of the subject matter insured (and destroyed or irretrievably lost or so damaged that it could be given up as lost or when the cost of the repairs would exceed its value after the repairs); moreover the insurer becomes entitled to whatever benefit the insured has recovered or obtained from any third party; the insurer can sue any outsider who caused the loss,

in the same way as the assured would have, had he not been compensated by the insurer. The subrogation of the insurer extends to the value insured, and no more than that. If the ship or the goods are found back after the constructive loss, e.g., when an embargo or a restraint of princes or people is removed, the ship becomes the property of the insurer, or in the case of the goods the goods go to the insurer, if the insurer has already paid the insured and compensated him for the loss. [See also **Sec. 135 A (2) of Transfer of Property Act.**]

**Notice of Abandonment**

When a constructive total loss has taken place, it is the duty of the insured to give notice to the underwriter that he (the insured) has abandoned and does surrender to the underwriter all his right, title and interest in all that remains of the subject matter of the insurance. The insured can recover compensation from the underwriter for his constructive total loss only after he has given a notice of abandonment to the insurer, abandoning all that remains in the subject matter, or that if the same be found again or recovered, he (the insured) shall give it up to the insurer who shall be entitled to it.

The effect of failure of the assured to give the underwriter the notice of abandonment is that the loss shall be treated not as a total loss but only as a partial loss. The abandonment must be an unconditional abandonment, and must be made, by a notice, after the fact of the loss has come to the knowledge of the assured.

**Form of Notice of Abandonment**

Date, .....

To .....

(name of the underwriters)

Gentlemen,

I/We hereby give you notice that I/We abandon in your favour all my/our right, title and interest in (the cargo on.....) in so far as that interest is covered by the policy dated..... and issued by you in my/our favour.

The circumstances giving rise to this notice of abandonment are as follows :—

.....  
.....  
.....

Kindly acknowledge the receipt of this notice and your acceptance of this abandonment.

Yours faithfully,

Signature of the insured.

### Alteration of Policy

A policy of marine insurance, like any other policy or contract, is avoidable by the aggrieved party, if there is any **material** alteration made in it **without the consent of the other party**. Any substantial or **significant** (but not negligible) alteration will avoid the policy, if the other party so desires. Consent of the parties is essential for a valid alteration. **With mutual consent**, the parties may alter their policy by making **indorsements on the policy and signing the same**. The alteration of the policy is, however, subject to the following restrictions :—

- (1) The alteration must be effected before the determination of the risk and notice must be given to that effect ;
- (2) Any additional amount cannot be insured for by virtue of the alteration ;
- (3) If the policy was made originally for less than six months' duration of risk, the alteration must not extend the period of the risk beyond six months ; in any other case not beyond one year.

### Refund of Premium

**Subject to any agreement to the contrary**, premium is refundable *in toto* by the underwriter in case of **total failure of consideration**. If the risk never started, the underwriter ran no risk, and he must refund the whole of the premium. On the other hand, where the risk is an **indivisible** one, and has commenced, the insurer is not bound to refund the premium or any portion of it. Where the consideration is not an entire one, but is **apportionable**, and there is a **total failure of any apportionable part** of the consideration a **proportionate portion of the premium** is refundable.

In the case of a void policy, or where a policy has been avoided by the insurer right from the very start, the premium or a portion thereof is refundable, **provided there has not been any fraud or illegal act committed by the insured**. So also where the insured thing, or any part thereof, had **never been imperilled**, premium, or a part thereof, can be refunded, **to the extent to which there is a failure of consideration**. Where the assured has, **without knowledge that he was doing so, over-insured**, the Court may allow him a refund of a part of the premium. In the case of double insurance, the Court may allow refund of a **proportionate part of the several premiums on the two or more policies**. If the policies are effected at different times, and a policy effected at an earlier date has borne the entire risk, or if a claim on such policy has been paid in full, premium or any portion thereof shall not be refundable in regard to the policy. **If the double insurance has been knowingly made by the insured so as to make it over insurance he cannot recover any portion of the premium.**

Where the interest of the assured was **defeasible** and is **terminated during the pendency of the risk**, the premium or a portion thereof is refundable.

Unless the policy was by way of wager, if the assured happens not to have any insurable interest throughout the risk, then the premium or a portion of the premium can be recovered.

Premium is not refundable to the party acting in fraud on the insurer. Nor is it refundable when the assured has entered into a wager, having no insurable interest. (Pearl Life Assurance Co., 1904, 1 K. B. 558.)

### **Assignment of Marine Policy**

Unless the terms of the policy disallow assignment, the policyholder (assured) can transfer it to some one else.

**The assignment may be effected by indorsement on the back of the policy or by a separate instrument of assignment.** The assignment may be made even after the loss has taken place. Of course, the assignee takes the policy subject to the equities existing between the assignor and the insurer. Whatever defences or rights in mitigation the underwriter could have pleaded against the assignor could also be pleaded by the underwriter as against the assignee.

An assignment is not valid if the assignee is a person in whom the property in the subject matter insured has not vested. (Section 135 of the Transfer of Property Act). The assignor must possess insurable interest at the time he effects the assignment, if the assignment by him is to have legal effect.

Under section 135 A (1) of the Transfer of Property Act, the assignee of a marine policy can sue in his own name. [And under section 135 A (2), Transfer of Property Act, the insurer is subrogated in case of payment by him (it) for the total loss of the insured.]

## CHAPTER XXIV

### CONTRACTS OF CARRIAGE

#### Common Carriers

A common carrier is a carrier, other than a Government Carrier, who **indiscriminately** (for all persons) professes to carry goods for a freight from one place to another place, either by land or by water. (Sec. 2 of the Carriers Act, 1865.) See also Belfast Rope Work Co. 1918, 1 K. B. 210. A common carrier is bound to carry goods for all persons alike, provided the freight chargeable by him is paid to him, provided there is accommodation on his conveyance, and provided there is nothing objectionable or illegal about the carrying of the goods, because his obligation is not contractual but based on the exercise of his public undertaking. Owners of ships engaged generally in the transportation or carriage of goods for a freight, owners of stage-wagons for carrying goods for hire, bargemen, lightermen, ferrymen and hoymen, are regarded as common carriers. Under the Carriers Act, 1865, a common carrier is a person, other than the Government, engaged in transporting or carrying for hire property from one place to another by land or inland navigation for all persons indiscriminately; and "person" includes any association or body of persons whether a company or not.

#### Private Carriers

A private carrier is a person, like a town carman, not carrying on his work regularly, but **only undertaking casual jobs** between certain termini. (Brind v. Dale, 1887, 2 Moo. & R. 80). A wharfinger who only carries goods from the ship to the warehouse is not a common carrier. (Consolidated Tea Co. v. Oliver's Wharf, 1910, 2 K. B. 395.)

#### Liabilities of Common Carriers

A common carrier being under a public employment is bound to accept and carry the goods of any person who gives any goods of a type which he professes to carry, and offers to pay a reasonable hire, unless the common carrier has, for the time being, no accommodation on his conveyance. (Garton v. Bristol & Exeter Rly. Co., 1861, 1 B. & B. 112.)

A common carrier must deliver the goods to the consignee at the place of destination. (London & North Western Railway Co. v. Bartlet, 1862, 7 H. & N. 400.)

A common carrier must carry the goods in the usual and customary manner without any deviation, except when deviation becomes necessary or justifiable.

A common carrier is not bound to carry goods which are not of the type he professes to carry, or if the goods are of a dangerous character or exposes him to a risk of serious type or if the carriage of such goods becomes illegal.

Under the old English Common Law the common carrier was **like an insurer** and his liability was **absolute liability**, i.e., he was liable even though not negligent, unless there was an "Act of God" i.e., an act over which he could have no control, or an act caused by the king's enemies. But under Section 8 of the Carriers Act, 1865, the liability of a common carrier is **reduced to cases of negligence and wilful wrongdoing** on the part of the carrier or his agent or servant. Unless there is negligence or a wilfully wrongful act, the common carrier is not liable for any loss or damage to the goods agreed to be carried or carried by him.

With regard to carriers by land, they are not liable for loss or injury to certain specified articles (in England over £10 in value) such as gold, silver, jewellery, precious stones and precious metals, watches, clocks, negotiable instruments, china



pottery, platinum, iridium, radium, etc., unless at the time such goods were given to the carrier for carriage, the nature and value of such goods was declared by the consignor and an additional charge paid to the carrier. In India, under Section 3 of the Carriers Act, 1865, the liability of a common carrier for loss or damage to goods delivered to him to be carried, and exceeding in value Rs. 100 and of the description contained in the schedule to the Carriers Act, is excluded even in cases of negligence, **unless the person delivering such goods or his agent shall have expressly declared to such carrier or his agent the value and description of such goods beforehand, or unless deliberate wrong-doing had caused the loss or damage.** If the value and description have not been so declared at the time of consignment, the carrier cannot be held liable even in spite of negligence on his, or his agent's, or servant's, part; but where there was a wilful wrong-doing, by the carrier, or his agent, or servant, there would be liability in spite of the consignor not having declared the value and nature of such goods. (Section 8 of the Carriers Act.)

[Goods which are included in the Schedule to the Act are given in a note, under the heading—"Degree of Care Required to be taken by a Bailee", in Chapter XV, see pages 97, 98.]

[For the law relating to liability of Carriers by navigation (sea-carriage), see the notes under the heading "Degree of care required to be taken by a Bailee" in Chapter XV, page 98.]

For the law relating to liability of railway carriers and for damages for injury suffered by a passenger in a railway, and for the law relating to risk notes and limitation of liability of a railway company by a risk note, see under the heading "Degree of Care required to be taken by a Bailee" in Chapter XV pages 97, 99, 100.

#### **Loss or Deterioration of Goods or Animals Carried by Railway**

Section 72 of the Railways Act (IX of 1890) provides that the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to it to be carried by railway shall be that of a bailee of goods. The railway administration must take as much care of the goods as an owner would take of his own goods looking to the nature and value of the goods and looking to the amount of skill required in bailments of like character.

Section 73 of the Railways Act provides that the responsibility of a railway company for loss, destruction or deterioration of animals delivered to it to be carried shall not exceed in the case of elephants Rs. 1,500 per head, or horses Rs. 750 a head or, in the case of mules, camels or horn-cattle two hundred rupees a head, or in the case of donkeys, sheep, goats, pigs, birds or dogs or other animals, thirty rupees a head, unless the consignor declared them, at the time of delivery for carriage, to be of a higher value. If such higher value is declared, the railway company may charge for the increased risk a percentage upon the excess of the value so declared over the sums mentioned. A railway administration cannot be held liable for any loss or damage resulting from fright or restiveness of the animal.

#### **Loss of or Damage to Luggage Carried by Railway**

Section 74 of the Railways Act provides that a railway administration shall not be responsible for the loss, destruction or deterioration of any luggage belonging to or in charge of a passenger, unless a railway servant has booked it and given a receipt for it.

A servant can sue for loss or damage to the luggage though the fare may have been paid by the master.

#### **Liability of Railway Company for Loss of or Damage to Goods or Animals**

In the case of goods sent by railway, risk notes have been abolished, and the liability arising out of such risk notes has been contained in the statute itself by virtue of the Indian Railways (Amendment) Act, 1949, and when goods are carried in open wagon the railway company cannot be held liable.

Under section 72-A of the Indian Railways Act, 1890, any person delivering to a railway company or administration any goods or animals to be carried by the railway must execute a forwarding note in such form as may be prescribed by the Railway administration and approved by the State government, in which the sender or his agent must give such particulars in respect of the goods or animals as may be required—if the goods or animals are to be carried by a goods train, or if the goods are to be carried by any other train (including a passenger train) and consist of articles carried at owner's risk rates or articles of a perishable nature or articles mentioned in the Second Schedule to the Railways Act (such articles are all mentioned in the commentaries in this book) or are defectively packed articles or articles in a defective condition or explosives or any other dangerous goods.

Section 74-A of the Indian Railways Act provides that where goods tendered to a railway administration for carriage by a railway train are liable to leakage, wastage, damage or deterioration while in transit, because of their defective condition or because they are defectively packed or not packed as required by the general or special order issued by the general controlling authority, and the fact of the defective condition or packing has been recorded in the forwarding note by the sender or the agent of the sender, the railway administration shall not be liable for any deterioration, leakage or damage, or for the condition in which such goods are available at their destination, except upon proof of negligence or misconduct on the part of the railway administration or any of its servants or agents.

Under Section 74-B, a railway company shall not be held liable or responsible for any deterioration, destruction or damage arising by reason only of the goods having been carried in an open vehicle or carriage, when the goods have, at the request of the sender or his agent so recorded in the forwarding note, been so carried in open vehicle or vessels, though the goods under ordinary circumstances would be carried in covered vehicles or vessels and are such as are liable to damage if carried otherwise than in a covered vehicle.

Section 74-C provides that where any goods or animals are tendered to a railway administration for carriage by railway, and the railway administration provides for their carriage either at the ordinary tariff rate (called the railway risk rate) or in the alternative at a special reduced rate (called the owner's risk rate), the goods or animals shall be deemed to have been consigned for carriage at the owner's risk rate unless the sender or his agent chooses to pay the railway risk rate and mentions that fact in writing in which case the railway administration is bound to issue, and shall issue, a certificate to the consignor that the goods are carried at the railway risk rate. When the goods or animals are sent or deemed to be sent at owner's risk rate the railway administration shall not be liable for any loss, damage, destruction or deterioration from any cause whatsoever except on proof that such loss, damage, destruction or deterioration was due to misconduct or negligence on the part of the railway administration or its agent or servant.

#### Burden of Proof

Where the whole of a consignment of goods or the whole of any package forming part of a consignment, carried at owner's risk rate, is not delivered to the consignee and such non-delivery has not been proved by the railway administration to have been caused by fire or accident to the train, or where the goods sent had been so covered or protected that the covering or protection could not readily be removed by hand and it is pointed out to the railway administration or authority at the very time of delivery or before delivery that any part of such package or the consignment had been pilfered in transit, the railway administration shall be bound to disclose to the consignor how the package or consignment was dealt with throughout the time it was in its possession or control, and if such disclosure does not show any negligence or misconduct (inferable) on the part of the railway administration or any of its agents or servants, then (because the goods are at the owner's risk) it shall be the burden of proof on the consignor to prove misconduct or negligence on the part of the railway administration or its agent or servant.

When a consignor of goods or animals sues any railway administration for any loss, damage, destruction or deterioration or delay (*i.e.*, for compensation), the burden of proof shall lie on the person claiming the compensation, with respect to the value or the higher value in case of animals and in the case of any injury to animals the extent of the injury, and in case of goods or packages that the value declared by the consignor or his agent is the true value. But it shall not be necessary for the consignor to prove how the loss, delay, damage, destruction or deterioration was caused.

## AFFREIGHTMENT

A contract of affreightment is a contract under which a shipowner agrees to carry from one place to another goods by water or to provide a ship for the purpose of carrying goods in consideration of a return called the freight.

The term "freight" is, strictly speaking, used to mean the price for carriage of goods by sea or water; but, broadly speaking, this term can be used also with regard to carriage by land.

The main types of contracts of affreightment are :—

- (1) Charterparty,
- (2) Bill of Lading.

**Points of Difference between Bill of Lading and Charterparty**

- (1) A bill of lading says that goods have been shipped in good order and condition, if it is a clean bill. A charterparty does not make such an acknowledgment.
- (2) A bill of lading is a document of title and is quasi-negotiable. Not so a charterparty.
- (3) A bill of lading does not give the lease of the ship; a charterparty may involve the demise of the ship and the lease of the services of the master.

**CHARTERPARTY**

When the consignor of goods enters into a contract with the shipowner to load a complete cargo or to provide a large portion of the cargo, a charterparty is usually entered into. But when the agreement provides only for carrying a small portion of the cargo the contract usually is effected through a bill of lading. A bill of lading is a document of title which acknowledges that the goods are carried and that they are deliverable to the person named as the consignee or the order. In the case of a charterparty the merchant who takes a ship by hire is called the charterer or the hirer. Before the bill of lading is given a temporary receipt is given; this temporary receipt is known as the **Mate's Receipt**. Later, the bill of lading is made out by the master of the ship.

A charterparty is an agreement by which a shipowner agrees to provide an entire ship or to provide a part accommodation of the ship at the disposal of a merchant for the carrying of his goods to the agreed place for a certain sum of money payable as freight. A charterparty may be (1) **with a demise of the ship** or (2) **without a demise of the ship**. It is said to be with a demise of the ship if the charterer is regarded for the time being as the owner of the vessel, and the master of the ship and the members of the crew are to be regarded as the servants of the charterer or hirer of the ship. But where the master of the ship remains the agent and servant of the owner of the ship, the charterparty is said to be without a demise of the ship.

**FORM OF CHARTERPARTY****Stamp (See List of Stamp Duties)**

THIS CHARTERPARTY entered into on .....19 . IT IS  
**THIS DAY MUTUALLY AGREED** between.....  
 (shipowner's name) of ..... the owner of the  
 Good Ship (Vessel), under God, called the.....(name of the  
 Ship), of the measurement of.....Tons Register, or there-  
 abouts, and.....(name of the merchant consig-  
 nor), that the said ship being tight, staunch and strong and in every way fitted for  
 the voyage, shall with all convenient speed, sail and proceed to.....  
 (place of loading) or as near thereto as she may with safety get, and there load a full  
 and complete cargo, as agreed between the parties hereto, viz.....  
 tons, which cargo shall be brought to and taken from alongside at the consignor's risk  
 and cost, not exceeding what she can reasonably stow and carry over and above her  
 tackle, apparel, provisions and furniture, and being so loaded shall therewith proceed  
 to.....(name of port of destination)or as near thereunto as she  
 may safely get, and deliver the same on being paid freight.  
 .....days shall be allowed for loading and unloading of the cargo,  
 as ky days; for longer time taken (in excess of the lay days) Demurrage shall be at  
 .....per day.

Restraint by Princes and Rulers, the King's enemies, Force majeure, and other Dangers  
 and Accidents of the Seas, Rivers and Navigation of whatsoever nature and kind, singular and  
 all during the voyage always excepted.

{ Signature of the shipowner .....  
 { Witness to the above signature .....  
 { Signature of the Merchant/Consignor .....  
 { Witness to the above signature .....

### Implied Conditions in Charterparty

(1) **Seaworthiness** is an essential implied condition whereby the shipowner vouches the reliability of the ship—her ability to encounter the voyage and the perils attached thereto, and that she is in a fit stage to carry the agreed cargo. This warranty implies that the ship is quite fit for the voyage and is properly built, with good machinery and appurtenances and master and mariners, and with sufficient provisions required for the voyage. For loss or damage caused by breach of this condition the cargo owner (consignor) can claim damages. If the defect was discovered before the starting of the ship (on her voyage) the cargo-owner can avoid the agreement on the ground that there was a breach of an essential stipulation—an implied condition that the ship shall be worthy of the voyage.

(2) The ship shall be ready and willing to start on her voyage without unreasonable delay—with all reasonable dispatch or diligence. This is another implied condition in a charterparty.

(3) There shall be no deviation, except in justifiable circumstances, *i.e.*, to save human life, or to flee from pirates, marauders, to avoid rough weather, to render medical or surgical aid to any person on board the ship.

(4) The consignor shall not ship dangerous goods unless their nature and value are clearly stated beforehand and are marked on each package, and notice in writing is given to the master of the ship or to its owner in respect of the writing on the packages.

### IMPORTANT CLAUSES OF CHARTERPARTY—EXPLAINED

#### Whereabouts of the Ship and the Time the Ship will Sail

The charterparty states where the ship is at the time of the contract, or that she will be at a certain place on a certain day or sail on a voyage at or by a certain named day. The clause amounts to a condition of the contract, the breach of which leads the other party to avoid the agreement. (*Behn v. Burness*, 32 L. J. Q. B. 204.)

#### Seaworthiness

It is a condition of the contract that the ship shall be **seaworthy, *i.e.*, reasonably safe for undertaking the voyage**—looking to the nature of the voyage.

**The ship shall carry on with her Voyage without Unreasonable Delay and without Deviation**

#### [When is Deviation Justifiable?]

There is an implied undertaking in a contract of charterparty that the ship will commence her voyage **as agreed and shall not delay unreasonably or deviate unjustifiably**. Deviation is allowed to **save**

the ship, the crew or the cargo, or to save human life or help a ship in difficulty or for the purpose of avoiding pirates, enemies, or under circumstances beyond the master's control, *e.g.*, rough weather, storm, gale, fog, or for obtaining medical or surgical help for any person on board the ship. Under Art. III, R. 4, of the Carriage of Goods by Sea Act, the carrier is not liable for any loss or damage caused by a deviation for saving life or property.

### **Shipowner's duty to take the ship to the port agreed and load goods there**

It is the duty of the shipowner to take the ship to the place agreed to as the place of loading, or to the usual port of loading; the shipowner must then give notice to the consignor or charterer that he is ready and willing to load the cargo at the place named in the charter. (*Bentsen v. Taylor*, 1893, 2 Q. B. 274). The charterer or the consignor must then provide the cargo to the shipowner alongside the ship or as agreed. The cargo must be in accordance with the agreed terms of the contract of carriage.

### **"Always afloat"**

The words "always afloat" signify that it is the duty of the shipowner to see that the ship shall be sent to a port where she can remain in safety with her cargo, **without touching** the ground. If the shipowner knew that owing to the condition of the tides, the ship would not be in a position to load 'always afloat,' the charterer cannot be held liable for the resulting delay.

### **Undertaking to load a "full and complete cargo"**

When the consignor undertakes to load a full and complete cargo, he is bound to load as much cargo as the ship can with safety carry, subject to the maximum agreed to be loaded. A full and complete cargo means a cargo which is full and complete according to the custom of the port of loading and which the ship can safely carry; but the consignor is not bound to load more than what he has agreed (with the shipowner) to load, though the ship could carry more than the agreed maximum. (*Morris v. Levison*, 1876, 1 C. P. D. 155.)

### **The Clause regarding Lay Days and Demurrage**

The charterparty provides for the number of days, known as lay days, within which the cargo may be loaded or unloaded. Lay days are the agreed number of days allowed by the charterparty to the charterer, or consignee, for loading or unloading (as the case may be) the cargo. Lay days begin from the time the charterer has been intimated by the shipowner on the ship's arrival to the place where the loading or unloading is to be done. Lay days are either

“working” or “running” days. If the lay days are allowed as working days, holidays and Sundays are not to be counted (in counting the number of lay days) but if the lay days are running days, then Sundays and holidays are included and must be counted.

Where the charterparty does not mention any lay days the charterer must load or the consignee must unload within a reasonable time.

Taking a little less than half-day will be considered as half-day (as half a lay day.) (*Brenckelow & Co. v. Boulton*, 1875, 10 Q. B. 346.)

When the cargo is not loaded or unloaded within the lay days allowed, the shipowner is entitled to the agreed damages; such damages are known as **demurrage**, but the term “**demurrage**,” in its broader sense, signifies also the unliquidated damages for undue deviation not expressly provided for. (*Clink v. Rattford*, 1891, 1 Q. B. 625.)

### Cesser Clause

When the charterparty contains a clause to the effect that the liability of the charterer shall cease on the shipment of the cargo, the clause is known as “Cesser Clause”; because the ship-owner is given a lien on the cargo for freight and demurrage, this clause is inserted. Where the shipowner is not given any lien, the Courts will lean against relieving the charterer. (*Clink v. Rattford*, 1891, 1 Q. B. 625.)

### Liability of Shipowner to “deliver the goods in the usual manner”

Brett, L. J. in *Nelson v. Dahl*, 1879, 12 Ch. D. at p. 592, said : “The liability of the shipowner as to the commencement of the unloading is to use all reasonable dispatch to bring the ship to the named place where the carrying voyage is to end, unless prevented by excepted perils, and when the ship is there arrived, to have her ready with all reasonable dispatch to discharge in the usual or stipulated manner.”

The consignee (to whom the goods are to be delivered) must take the cargo from alongside or from the ship’s hold (as per the stipulation), and must provide proper appliances for taking the delivery of the goods. (*Dahl v. Nelson*, 1881, 6 App. Cas. at p. 43).

### FREIGHT—KINDS OF FREIGHTS

The consideration in terms of money in a contract of affreightment is known as **freight**. The term “freight”, in a general or broader sense, however, includes the consideration for carriage by

land also. **As a rule** freight is payable after the voyage has been completed and **upon delivery of the goods**. Payment of the freight and delivery of the cargo are simultaneous or concurrent conditions. (*Liddard v. Lopes*, 1809, 10 East, 526.) There are, however, cases in which freight is payable even before the delivery of the goods is made or the voyage is terminated.

### **Advance Freight**

Freight is called **advance freight** when it is payable **at the very starting** of the voyage and is payable by the shipper to the ship-owner **before he delivers the goods**. Advance freight, however, is not recoverable from the ship-owner if the goods are all lost after the freight is paid ; but it is payable if the cargo is actually put on the ship and carried ; if the cargo got lost or destroyed before the commencement of the voyage, and before due date of payment, then advance freight would not be payable ; (*Weir & Co. v. Girvin & Co.*, 1900, 1 Q. B. 45) ; but if the cargo got lost or destroyed before the commencement of the voyage, but **after the due** date of payment, then advance freight is payable. (*Byrne v. Schiller*, 1871, L. R. 6 Ex. 319.)

### **Lump Freight**

It is a freight payable as a gross sum for the entire use of the ship for one entire service. (*Robinson v. Knights*, L. R. 8 C. P. 465.) If the ship-owner is ready to perform his part of the contract and to take the goods, he is entitled to a lump freight though no goods are actually shipped or though part of the goods actually shipped be not delivered ; provided the shipowner delivers **even some goods out of the whole consignment with whom**, he would earn the lump freight ; but if the whole cargo is lost no freight would be payable to the ship-owner.

### **Back Freight**

It is the freight payable back to the freighter as damages from the carrier for not delivering the whole of the goods or part of the goods, when such non-delivery of the whole or part is caused by the carrier's default. If freight was paid in advance it is recoverable ; and what is so recovered is known as 'back freight'.

### **Dead Freight**

It is the term applied to damages payable to the ship-owner for the default of the consignor or charterer in loading a full and complete cargo according to the contract. [*McLean v. Flemming*, 1872, L. R. 2 H. L. (Sc.) (499.)]

### **Freight pro rata**

Where only a part of the cargo is delivered, though the ship-owner had loaded on his ship a full cargo, or where the ship-owner, having undertaken to load a full cargo, loads and carries only a portion of the cargo, he can, unless there is a contract for lump freight, claim only a proportionately lesser freight for the quantity delivered

### Primage (Hat Money)

“Primage” or “hat money” is the extra percentage agreed to be paid over and above the agreed freight. Legally it is the master’s remuneration and not the ship-owner’s. In practice, however, the master may give it away to the ship-owner.

### BILLS OF LADING

A bill of lading is a document witnessing that goods have been shipped by the consignor to be carried to the port named therein as the port of destination and to be allowed there to be taken delivery of by the consignee (named therein) or to some other person to whom the consignee may have indorsed the document, or to bearer. It is a quasi negotiable instrument. (Sec. 2 of the Sales of Goods Act—definition of document of title). It is a document of title and can be transferred by mere delivery or by indorsement and delivery. [Sec. 2, Sale of Goods Act ; The Indian Bills of Lading Act (IX of 1856) Section 1.] A bill of lading may be to bearer—in which case the goods are deliverable to the bearer ; the instrument can be transferred from hand to hand by mere delivery (without any indorsement). If it is drawn to a specified person only it is not negotiable.

A bill of lading is said to be a **clean bill of lading** when there is nothing to modify or qualify the fact or the statement that the goods are shipped in good order and condition.

A bill is called a **through** bill of lading when transshipment or partial carriage by land also is involved in the carriage of the goods. In such a case the shipowner usually charges for carriage by land also.

### FORM OF BILL OF LADING

#### Stamp (See Chapter on Law of Stamps)

Shipped in apparent good order and good condition by.....  
 (name of merchant /consignor), at.....(state name of port of  
 loading), in and upon the good ship (Vessel), under God, called the.....  
 (name of the Ship / Vessel), whereof is master for the present voyage.....  
 .....state name of the master), the packages of merchandise goods  
 marked, described and numbered as in the margin hereto as in this bill of lading,  
 are to be delivered in the like good order and condition, subject to the terms and  
 provisions hereinafter stated at the port of.....(state the  
 port of destination or as near thereto as she may safely get), to.....  
 .....state name of consignee) or to his assigns, upon his or their  
 paying the freight for the said goods with the primage and average.

And it is mutually agreed as follows :—

[Here set out all the conditions, *e.g.*, those relating to freight, lien, carriage, transshipment, lodging of claims, delivery, general average, exception of risks such as arrests by foreign Government, Kings, Princes and Peoples, the King’s enemies, vis major, and all and other dangers and accidents of the Seas, Rivers and Navigation of whatever nature and kind, singular and all.]

In Witness Whereof.....

Dated this day of.....19 ..



### Qualified Bill of Lading

A bill of lading which qualifies the statement that goods are shipped in good condition, is a qualified bill of lading. And if words such as "quantity not known" are used in the bill of lading, it is not even *prima facie* or rebuttable evidence of the quantity of goods shipped. (New Chinese Antimony Co., 1917, 2 K. B. 664).

### Mate's Receipt

The mate is an officer on the ship. The master is the Captain ; the mate is subordinate to the master.

Before the master can find it convenient to issue a pakka bill of lading, the subordinate officer, *viz.*, the mate passes what is known as the **mate's receipt** which is no more than an acknowledgment of the receipt of the goods on board the ship. A mate's receipt is not a document of title. A bill of lading is a document of title to goods.

The mate's receipt is in due course exchanged for the pakka document called the bill of lading. If by any chance, different persons get the bill of lading and the mate's receipt, he who has the bill of lading will get the goods from the master. (Baumwel v. Furness, 1893 A. C. 8.)

### Maritime Lien

It is a lien on the maritime res for services done or for injury suffered. A maritime lien is not a possessory lien. It exists irrespective of possession. (The Cella, 1888, 13 P. D. 32.) The lien possessed by the master of a ship for wages and disbursements, the lien possessed by a bottomary bond holder, the lien possessed by a seaman for his wages, the lien possessed by a salvor, are all examples of maritime lien. With regard to priority in case of maritime liens, the rule is : **the last in time should rank first in payment**, because the later (the last) benefit is more advantageous and preserving of the property, and can be said to have a superior equity. Of what use would the earlier help have been, if the last help had not been rendered. It is that which is the crystallizing factor in saving the common venture.

## PARTICULAR AND GENERAL AVERAGE

### Difference between General Average and Particular Average

A particular average loss is a partial loss of the subject matter insured and **caused accidentally or fortuitously by a peril insured against**. As opposed to it is what is known as a general average which is a loss caused **deliberately** and under the circumstances, **reasonably for the protection of the common venture**. If the common adventure is in danger, then jettison, *i.e.*, throwing overboard the goods, cutting off the masts, sails, with a view to lightening the weight

of the ship and rushing her to a port of safety or to the port of destination, would be required. If real loss is so caused to the owners of the cargo jettisoned, such owners are entitled to compensation and contribution from those cargo-owners who benefited by the jettison and the consequent saving of the venture.

A particular average loss affects the owner of the goods lost ; but a general average loss falls on those who got the benefit (the saving of their goods) at the expense of those whose goods were put to the general average act.

### General Average Act

A general average **act** means an act done, under the orders of the master of the ship, deliberately so as to cause loss, the idea behind it all being to lighten the weight of the ship and rush her to the nearest port of refuge, and thus to save the common venture—leaving those who suffered such loss to their right of contribution by those whose goods were not jettisoned. Jettison of cargo, sale of cargo, sacrifice of the ship, her tackle or freight, destruction of any part of the ship, casting away of sails, masts or scuttling of the ship to admit water to extinguish flames, etc. are examples of general average acts.

### General Average Contribution

General average contribution is the contribution by those whose goods were saved, in favour of and for compensating those who lost by the general average act.

### Conditions Precedent to General Average Contribution

The following are the conditions precedent to the right to contribution :—

- (1) The common venture must have been **in danger** at the time the general average act was done ; otherwise there was no necessity for the act or the sacrifice ; moreover, the sacrifice must have been found inevitable.
- (2) The act or the sacrifice must be **voluntary**, and not fortuitous.
- (3) The sacrifice must not be a make-believe, *e.g.* sacrifice of useless goods or old and abandoned articles ; the sacrifice must be real, *i.e.*, of useful or valuable articles.
- (4) The danger which gave rise to the necessity must not have been caused by any act or default of a person wishing to claim in the general average loss.
- (5) As the result of the general average act, the common venture must have actually been saved.

### Adjustment of General Average—Average Adjusters

**Adjustment** of general average means the preparation of a statement of claim on the general average loss. The adjustment is done by experts known as **Average Adjusters**.

### General Average Bond

The lien which a shipowner has against the goods (cargo) for the general average contributions is utilised not directly but through a general average bond. Where the amount payable is not a fairly substantial sum, the shipowner releases the cargo upon the consignees signing what is known as a **general average bond** whereby the consignees promise to pay to the shipowner what may be found due payable by them as their contributions.

### General Average Deposit—G. A. Deposit Receipt

The shipowner has a lien against the cargo for the general average contributions by the consignees, in respect of the general average loss. If the amounts payable are not trifling but are considerably good amounts the shipowner can instead of enforcing his lien take from the consignees a **general average deposit** which is made in a bank in the name of two persons who are made trustees for the same; one of these persons is selected by the shipowner and the other by the consignees. A **G. A. Deposit Receipt**, i.e., a receipt for the G/A Deposit is given by the shipowner to the consignees.

If the underwriters guarantee that the G/A contributions will be properly discharged, then the shipowner releases the goods without any bond or deposit. Usually the guarantee is so given by the underwriters.

### York-Antwerp Rules

Generally, it is provided by contract that in the case of general average loss, the average, if any, should be adjusted according to what are known as York-Antwerp Rules.

The York-Antwerp Rules, 1924, are the result of rules drawn up at conferences held at York in 1864, at Antwerp in 1877, at Liverpool in 1890, and at Stockholm in 1924. (Smith's Mercantile Law, 13th edn. p. 402.) These Rules are provisions regarding the adjustment of the general average loss.

In the absence of a contract to the contrary, the adjustment of the average takes place **at the destination**, unless the voyage is terminated at an earlier port; if the voyage is terminated at an earlier port, the adjustment has to take place at that port. (*Chellew v. Royal Commission*, 1921, 2 K. B. 627). Unless the York-Antwerp Rules are made applicable by contract, the adjustment of amounts to be contributed will be governed by the local law. (*Fletcher v. Alexander*, 1868, L. R. 3 C. P. 375.)

**Bottomry and Respondentia Bonds or Bills**

When the master of the ship finds that there is imminent danger facing the ship and that to make her seaworthy it is necessary to borrow money and hypothecate the cargo and/or ship and freight, he can do so even without taking the consent of the cargo-owners or the ship owner, because it would be dangerous to wait till their consent is obtained. The master, having to act urgently, can, **as an agent of necessity**, hypothecate the ship, freight and cargo, or the cargo alone. If the ship, freight and cargo are hypothecated the contract is known as a **bottomry bond** or bill; if the cargo only is hypothecated the contract is known as **respondentia bond or bill**. The moneys borrowed under a bottomry or respondentia bond are repayable only if the ship reaches her destination safe, but not otherwise. It is for this reason that the lender can charge a heavy rate of interest. The master could borrow on such bond, provided there was no other mode of obtaining the money.

**Form of Bottomry Bond or Bill/Respondentia Bill or Bond.**

BY THIS BOTTOMRY/RESPONDENTIA BOND/BILL, I

.....(name of the master of the ship) master of the.....(name of the ship) of.....tons gross and.....tons net of the port of (name of the port) official number.....and now at the port of....., am bound unto.....(name of the lender), hereinafter called the lender) in the sum of.....(state the amount) for the payment of which I hereby bind myself.

And for further security of the said lender I do hereby hypothecate the said ship, and freight and cargo thereof (if a bottomry)/the cargo (if a respondentia bond) in consideration of the loan made by the said lender; and I hereby declare and promise that the said ship, freight and cargo (if bottomry)/the said cargo (if a respondentia) shall not be rehypothecated or further charged to any one else until payment of this bond is first made with the interest that may become due thereon. [Now state all the Conditions of the Bond, such as the stipulation that the lender shall not be entitled to demand the loan amount or any part thereof, or the interest thereon, or any part thereof, if the ship does not reach her destination safe and is cast away before her arrival at any port of refuge.]

IN WITNESS WHEREOF I have hereunto set my hand and seal this day of.....19 .

Signed sealed and delivered in the presence of

.....

Signature and seal of the master.

### Hypothecation

Hypothecation implies a charge not amounting to a mortgage. The term is used to denote usually an equitable charge, without possession.

### C. I. F. Contract

A c. i. f. contract is a contract in which the price (of the goods) charged includes the cost, insurance and freight. (C. stands for cost ; I. is insurance ; F. means freight) In a c. i. f. contract, even if the goods do not reach the buyer, the buyer has got to pay the price, provided he gets the documents of title and a policy of insurance effected with a reputed insurer, for on the strength of these documents he can recover from the insurer the money (which he has to pay as the price to the seller). It is for this reason that a c. i. f. contract is described as contract of sale of documents rather than goods. But it would not be quite accurate to describe a c. i. f. contract as such. We should rather describe it as a contract for sale of goods through documents (for it is the purchase of the goods—and not documents—after all). The duties of a seller in the case of a c. i. f. contract are to (1) ship the goods according to the contract (2) to effect a proper contract of carriage, (3) to procure a proper policy of insurance of the goods, and (4) send to the buyer all the necessary documents of title to the goods. (Johnson v. Taylor, 1920, A. C. 144 ; Nissim v. Haji, 17 Bom. L. R. 249.) The duty of a buyer is to pay (on the receipt of the documents and the policy of insurance) the price. But he is not bound to pay against a bare delivery of a telegram. (Steel Bros v. Dayal, 25 Bom. L. R. 1064.)

### F. O. B. Contract

It is a contract—free on board—in the case of sale of goods which are to be conveyed by ship. Under such a contract the seller must put the goods on board the ship at his own expense ; but for and on account of and thereafter at the risk of the purchaser, provided he has given notice of insurance to the buyer, if it be customary to insure the goods. On shipment the risk passes to the buyer, whether the goods are at that time specified or (even) unascertained. (Green v. Sichel, 1860, L. J. C. P. 213.) The seller has to bear the expenses of and up to the shipment.

### C. I. F. C. I. Contract

If when goods are bought through a commission agent, the buyer has to pay the commission and interest on the amount remaining unpaid for some time, and also the insurance charges and freight, the contract is called c. i. f. c. i. (cost, insurance, freight, commission, interest).

### **Contract Ex-Ship**

It is a contract in which goods are agreed to be sold and delivered out of a particular ship to come from a specified place. If and when the ship has arrived and a proper delivery order is given, the buyer's responsibility starts. In an ex-ship contract the seller delivers to the buyer the goods at his own expense to the port of destination. The seller must deliver the goods to the buyer, ex the ship which has reached the port of destination, at the usual place of delivery. He must pay to the owner of the ship all the freight and other charges, so as to enable the buyer to get undisturbed delivery of the goods free from any lien of the shipowner. He must hand over to the buyer a proper delivery order, and must give notice beforehand to the buyer to enable the buyer to insure the goods.

### **Contract F. O. R.**

A contract F. O. R. is one in which the property and the risk in the goods pass to the buyer (so as to make him responsible) only after the goods are delivered or put free on rail.

### **Contracts Ex-Godown**

In a contract to deliver goods at a godown, property and risk ordinarily pass from the seller to the buyer only after the required goods have been ascertained and appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller.

### **F. A. S. Contract**

An F. A. S. Contract is a contract whereby the sender of goods is to put the goods free alongside the ship (at his own expense). Then the goods are to be taken to the ship's hold by the buyer and are at the risk of the buyer. The seller is not responsible, provided he had given the buyer the requisite notice of the custom to insure, wherever there is such a custom.

## **SEAWORTHINESS AND SURVEY—UNDER THE MERCHANT SHIPPING ACT**

Under section 125 of the Indian Merchant Shipping Act, no steamship can carry more than twelve passengers between places in India or to or from any place in India from or to any place outside India, unless a proper certificate of survey is held, or unless the ship has been given by the Board of Trade or by the government a certificate of survey, provided the certificate is applicable to the voyage on which the steamship is about to proceed and provided she has not otherwise suffered any injury or damage or become unworthy,

or unless she has a certificate of survey granted under the Inland Steam Vessels Act, 1917 and applicable to the voyage on which the ship is to venture out, or unless she is carrying passengers during the interval between the time at which her certificate of survey under the Indian Merchant Shipping Act expires and the time at which it is first practicable to have the certificate renewed, or unless she has been exempted by the state government with the previous sanction of the Central Government by notification in the local official Gazette from the operation of the provisions of the Indian Merchant Shipping Act, as regards the holding of the certificate of survey.

Under section 127 of the Indian Merchant Shipping Act, no officer of Customs shall allow a port-clearance to any steamship until a certificate of survey is produced ; a ship may be detained by any officer of customs or any pilot on board until she provides the certificate of survey.

Under section 129, state governments may appoint surveyors with power to go on board a steamship to inspect the steamship and machinery, equipments and articles on board thereof, provided that the surveyor does not thereby unnecessarily hinder the loading or unloading of the steamship or unnecessarily detain or delay her from proceeding on her voyage. The owner, master and officers of the ship have to afford all reasonable facilities for survey and to give all such information regarding the ship and her machinery and equipments or any part thereof as the surveyor reasonably may require.

Under Section 134 of the Indian Merchant Shipping Act, when a survey is completed, the surveyor must, if he is satisfied that he can properly and truly do so, give the owner or master of the steamship surveyed by him, a declaration of survey, in the prescribed form, with the following particulars, namely:—

- (a) that the hull and machinery of the steamship are sufficient for the service intended and in good condition ;
- (b) that the equipments of the steamship and the certificates of the master, mate or mates, and engineer or engineers or engine-driver, are such as are required by law and are applicable to the steamship ;
- (c) the time, if less than one year, for which the hull, machinery, and equipments of the steamship will be sufficient;
- (d) the limit, if any, beyond which, as regards the hull, machinery or equipments, the steamship is in the surveyor's judgment not fit to ply ;

- (e) the number of passengers which the steamship can, in the opinion of the surveyor, with safety carry, distinguishing, if necessary, between the respective numbers to be carried on the deck and in the cabins and in different parts of the deck and cabins ; the number to be subject to such conditions and variations, according to time of the year, the nature of the voyage, the cargo carried or other circumstances, as the case requires ; and
- (f) any other particulars as may, for the time being, be prescribed.

The owner or master to whom a declaration of survey is given must send, within 14 days after the date of its receipt, the same to such officer as provincial government may appoint in that behalf.

Upon receipt of the declaration of survey, the provincial government must, if satisfied, that the provisions of Part III of the Indian Merchant Shipping Act have been satisfied, cause a certificate, in duplicate, to be prepared and delivered to the owner or the master provided the master or the owner has applied and paid for the same. Such certificate shall not continue to be in force after the expiration of one year from the date thereof ; or after the expiration of the period, if less than one year, for which the hull, boilers, engines or any of the equipments have been stated in the certificate to be sufficient ; or after notice has been given by the provincial government to the owner or master of the steamship to which the certificate relates that the certificate has been cancelled or suspended.

## **EXPLANATION OF SOME COMMERCIAL TERMS**

### **Bill of Adventure**

A bill of adventure is a writing by a merchant to the effect that the goods shipped by him in his name belong to another person who has undertaken the venture. The shipping merchant promises to account to the adventurer.

### **Bill of Health**

A bill of health is an official document certifying the condition of health of a person before he sets sail. Such certificates are given on board the ship at any particular port or ports or at the port of sailing.

### **Hat Money or Primage**

Hat money or primage is the reward or the gratuity to the master. It is the extra percentage agreed to be paid over and above the agreed freight. Legally it is the master's remuneration and not the ship-owner's. But the master may give it away to the shipowner.



### **Bill of Sight**

A bill of sight is an entry showing imported goods of which the merchant concerned does not know the quantity or quality.

### **Bill of Store**

A bill of store is a licence granted by the customs whereby goods which were exported could be reimported.

## **CARRIAGE BY AIR**

The law relating to carriage by air is governed by the Carriage by Air Act (XX of 1934). This Act follows the rules contained in the First Schedule to the Convention for the unification of certain rules relating to international carriage by air. This Convention was, on the twelfth day of October 1929, signed at Warsaw.

Section 1 of the Carriage by Air Act makes the Warsaw Convention Rules applicable to all international carriage of persons, luggage or goods, performed by aircraft for reward or to such carriage performed gratuitously by an air transport undertaking.

The expression "international carriage" means "any carriage in which according to the contract between the parties the place of departure and the place of destination, whether or not there be any break in the carriage or transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to the Convention." See Rule 1 (3).

Under the Indian Aircraft Act, the term "aircraft" is defined as "any machine which can derive support in the atmosphere from reactions of the air, and includes balloons whether fixed or free, airships, kites, gliders and flying machines."

An "aerodrome" means "definite or limited ground or water area intended to be used either wholly or in part, for the landing or departure of aircraft and includes all building, sheds, vessels, piers, and other structures thereon or appertaining thereto."

## **DOCUMENTS OF CARRIAGE**

### **Passenger Ticket**

For the carriage of passengers by air the carrier must deliver a passenger ticket which must contain the following particulars :—

- (1) the place and date of issue ;
- (2) the place of departure and of destination ;

- (3) the agreed stopping places ;
- (4) the name and address of the carrier or carriers ;
- (5) a statement that the carriage is subject to the Warsaw Convention Rules.

The absence, irregularity or loss of the passenger ticket does not affect the existence or validity of the contract of carriage. But if a carrier accepts a passenger without a passenger ticket, he cannot have the benefit of the Warsaw Convention Rules in so far as they limit his liability.

### **Luggage Ticket**

A luggage ticket is necessary in the case of luggage other than such personal objects of which the passenger takes charge himself.

The luggage ticket must be made out in duplicate—one part being for the passenger, and the other part being for the carrier.

The following particulars must be contained in the luggage ticket :—

- (1) the place and date of issue ;
- (2) the place of departure and the place of destination ;
- (3) the name and address of the carrier or carriers ;
- (4) the number of the ticket ;
- (5) a statement that the luggage shall be delivered to the holder of the luggage ticket ;
- (6) the number and weight of the packages ;
- (7) the amount of the value declared in accordance with Rule 22 (2) of the Warsaw Convention Rules.

The absence, loss or irregularity of the luggage ticket will not affect the existence or validity of the contract ; but if a carrier accepts the luggage without having a luggage ticket being delivered, the carrier shall not be entitled to the benefit of the rules limiting his liability.

### **Air Consignment Note**

The carrier is entitled to demand from the consignor a document called the “air consignment note” ; but the absence, loss or irregularity of this note does not affect the existence or validity of the contract of carriage.

The “air consignment note” has to be made out by the consignor in three original parts, and must be handed over with the goods. The first part must be marked “for the carrier”, and must be signed by the consignor. The second part must be marked “for the consignee”, and must be signed by the carrier and by the consignor and

must be sent to the consignee. The third part must be signed by the carrier and delivered by him to the consignor after he has accepted the goods. The carrier must have signed an acceptance of the goods ; his signature may be stamped ; that of the consignor may be printed or stamped.

The following are the particulars to be included in the air consignment note :—

- (1) the place and date of its execution ;
- (2) the place of departure and the place of destination ;
- (3) the agreed stopping places ;
- (4) the name and address of the first carrier ;
- (5) the name and address of the consignor ;
- (6) the name and address of the consignee ;
- (7) the nature of the goods ;
- (8) the number of the packages, the method of packing, and the particular marks or numbers on the packages ;
- (9) the weight, the quantity and the volume and dimensions of the goods ;
- (10) the apparent condition of the goods and of the packing ;
- (11) the freight, if agreed upon, the date and place of payment, and the person who has to pay it ;
- (12) if the goods are to be paid for on delivery, their place ;
- (13) the amount of the value declared ;
- (14) the number of parts of the note ;
- (15) the documents delivered to the carrier to accompany the note ;
- (16) the time fixed for the completion of the carriage, and a brief note of the route to be followed ;
- (17) a statement that the carriage is subject to the rules, regarding liability.

### **LIMITATION OF LIABILITY OF THE CARRIER**

In the carriage of passengers, the liability of the carrier for each passenger is, **in the absence of a contract for a higher amount**, limited to 1,25,000 francs.

As regards the objects of which the passenger takes charge himself, the liability of the carrier is limited to 5,000 francs per passenger. Any provision in any contract seeking to relieve the carrier from liability or to further limit liability is void and of no effect.

Rule 22 (2) provides that in the carriage of registered luggage and goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, when the package

was delivered to the carrier, a special declaration of the value at the place and time of delivery and has paid also a supplementary or further sum if the case so required. In that case, the carrier is liable to pay a sum not exceeding the declared sum, unless that sum is proved by the carrier to be a higher value than the real or actual value at the time and place of delivery.

**Time Limit within which Complaint, if any, must be made**

In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from date of the receipt of the luggage or within seven days from the receipt of the goods. In the case of delay in delivery of the goods the complaint must be made within fourteen days from the date at which the luggage or the goods has been actually delivered or placed at the disposal of the consignee.

## **CHAPTER XXV**

### **LAW OF INSOLVENCY**

#### **The Presidency-towns Insolvency Act, 1909**

**and**

#### **The Provincial Insolvency Act, 1920**

#### **Introductory**

The law of insolvency in India is contained in the Presidency-towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920.

The Presidency-towns Insolvency Act, 1909, applies to the Presidency-towns, *i.e.*, to Calcutta, Bombay and Madras. The Provincial Insolvency Act applies to the whole of India **outside** the Presidency-towns excepting the scheduled districts. As regards certain backward districts and undeveloped areas in the mofussil, it has been laid down by section 81 of the Provincial Insolvency Act, 1920, that the State Government may, with the sanction of the Central Government, notify that certain provisions in Schedule II of the Act shall not apply to those districts.

The law of insolvency in India is not based on custom or usage, but is based on the English Bankruptcy Law which is based on statute and not on custom or usage. English decisions can be taken help of and considered in deciding on the provisions of our Acts. (*Abdul Kader v. Official Assignee, Madras*, 40 Mad. 810.)

It may be noted that "insolvency" is the term used in the Indian Law; while in England the term used is "bankruptcy." Also "acts of bankruptcy" (expression used in English law) and the expression "acts of insolvency" (used in Indian law) have the same meaning.

The differences in the law as given in the Presidency-towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, are not many. In this chapter, points of difference are noted at relevant places.

#### **Insolvency Courts [Secs. 3-5 of Pr.-T.-Ins. Act ; 82-4 of Prov. Ins. Act]**

In the Presidency-towns the High Courts have the necessary jurisdiction in insolvency matters. Outside the Presidency-towns the District Courts have the insolvency jurisdiction. Even Courts subordinate to the District Courts may have insolvency jurisdiction if the same is conferred on them by the State Government concerned.

Insolvency Courts have power to decide all questions in insolvency—all questions of priority or title of any nature. (Sec. 7 of Pres.-T. Ins. Act ; Sec. 4 of Prov. Ins. Act.) But matters falling **outside** the insolvency would not be considered by the Court. (*Janendra v. Off. Assignee, Calcutta*, 30 C. W. N. 346.)

### Insolvency Legislation

A statute passed by the Parliament in the reign of George IV marked the start of insolvency legislation in India. That was in 1828. By the Act of 1828, Courts of Insolvent Debtors were established in India. In 1848, the Indian Insolvent Act, 1848, was passed, and this Act remained in force till 1909. Many important decisions arose out of the provisions of this Act. Some of these decisions are still good.

Under the Indian Insolvent Act, 1848, it was supposed that non-traders became insolvents through misconduct, while traders who became insolvents were probably unfortunate and that their insolvency was not due to any misconduct. Accordingly under the Act of 1848, insolvents who were traders were more favourably treated than those who were non-traders. This doctrine, however, is no longer accepted ; to-day the Court would consider the true cause of the insolvency, and would not consider or be guided away by the fact that a debtor is a trader or a non-trader.

The Indian Insolvent Act, 1848, remained in force in the Presidency-towns of Calcutta, Bombay and Madras, (and in Karachi) till substituted by the Presidency-towns Insolvency Act, 1909. The Act of 1848 was in force only in the Presidency towns, but not outside those towns. In the mofussil the provisions of Chapter XX of the Code of Civil Procedure, 1882, applied.

In 1907 was passed the Provincial Insolvency Act, 1907, which, in 1920, was substituted by the Provincial Insolvency Act, 1920.

The Presidency-towns Act, 1909, was amended by the amending Acts of 1914, 1920, 1926, 1927, 1929, 1930, and in Bombay by the Bombay Acts of 1933 and 1948.

The Provincial Insolvency Act, 1920, was amended by the amending Acts of 1926, 1927, 1935, and in Bombay by the Bombay (Amending) Act of 1948.

### The Object of Insolvency Law

The object of the insolvency law is two-fold. It is meant to protect an unfortunate debtor from trouble at the instance of his creditors and to give him freedom from imprisonment for non-payment of his debts. It is beneficial to the creditors in so far as the creditors can have their debtor declared insolvent by a competent Court of law, and thus have the property of the insolvent, (except

**3. An order of attachment in execution of a decree for payment of money has been subsisting against his property. [Sec. 14 Pt. I. Act; (also see Sec. 11); and Sec. 10 Prov. I. Act.]**

The debtor must have furnished to the Official Assignee a list of his creditors and must have deposited his books of account with the Official Assignee. (Sec. 15 of the Pres. T. Ins. Act; and Sec. 22 of Prov. Insol. Act.)

**FORMS OF PETITION AND INSOLVENCY NOTICE**

*CREDITOR'S PETITION*

I, . . . . . of . . . . . (or We, . . . . . of . . . . . and . . . . . of . . . . .) hereby petition the Court that . . . . . ordinarily residing at . . . . . (or carrying on business at . . . . . or personally working for gain at . . . . .) may be adjudged insolvent and say :—

1. That the said . . . . . is truly indebted to me (or us in the aggregate) in the sum of Rs. . . . . (amount of debt or debts, and the consideration).

2. That I (we) do not, nor does any person on my (our) behalf hold any security on the said debtor's estate or any part thereof for the payment of the said sum.

*Or,*

That I (we) hold security for the payment of (or part of) the said sum (but that I (we) will give up such security for the benefit of the creditors of the said . . . . . in the event of his being adjudged insolvent) (or, and I we estimate the value of such security at the sum of Rs. . . . .)

*Or,*

That, I . . . . . one of your petitioners, hold security for the payment of, . . . . .

That I, . . . . . another of your petitioners hold security for the payment of, . . . . .

3. That the said . . . . . within 3 months before the date of the presentation of this petition has committed the following act (acts) of insolvency, namely (here set out the nature and date or dates of the act or acts of insolvency relied on.)

*Signature.*

Verification clause.

**DEBTOR'S PETITION**

I . . . . . (having ordinarily resided or had a dwelling house within the limits of the Ordinary Original Civil Jurisdiction of this Court) (or having carried on business <sup>in person</sup> ~~through an agent~~ at . . . . . within the limits of the Ordinary Original Civil Jurisdiction of this Court) within a year before the date of the presentation of this Petition (or personally working for gain within the limits of the Ordinary Original Civil Jurisdiction of this Court) (or being imprisoned in execution of the decree of a Court for a payment of money, in the . . . . . Prison) and being unable to pay my debts, which are Rs. . . . . hereby petition the Court that I may be adjudged an Insolvent.

[Here state whether any previous petition has been presented to Court either by or against him, with particulars of any such petition and the manner in which it was disposed of.]

*Signature.*

Signed by the Debtor in my presence.

*Signature of witness.*

*Address*

*Description*

Filed the

day of

19 .

Form of List of Creditors (to be annexed to the debtor's petition).

CREDITORS

No.	Names and residences of creditors and claimants.	Nature and consideration of debt or claim and securities (if any); also, if the debt is disputed, the reason.	When Contracted.	Amount of claim.	Payments.	Interest due at date of presenting petition or filing Schedule with rate.	Balance due.	Admitted or disputed.

N.B.—In the case of mutual dealings if it is alleged that a claim by any party has been set off, such party must be named and entered both as creditor and debtor and the word "set-off" must be written under the amount.

Form of List of Debtors to be annexed to the debtor's petition.

DEBTORS

No.	Names and residences of debtors.	Nature and consideration of the debt and the securities (if any) for the same.	When contracted.	Amount.	Good, bad or doubtful.	Witnesses with their residences and other evidence by which the debt may be proved.

N.B.—In the case of mutual dealings, if it is alleged that a claim by any party has been set off, such party must be mentioned and entered both as a creditor and debtor and the word "set-off" must be written under the amount.



## INSOLVENCY NOTICE

(Title)

To

.....of .....

Take notice that within one month after service of this Notice on you, excluding the day of such service, you must pay to ..... of ..... [(or to ..... of his ..... (or their) agent duly authorized) ] the sum of Rs. .... claimed by ..... (creditor) as being the amount due on a Decree or Order obtained by him (them) against you in the ..... Court, dated ..... whereon execution has not been stayed, or you must furnish security for the payment of the said sum to his (their) satisfaction [(or the satisfaction of his (or their) said agent) ].

Take notice that non-compliance with the requirements of this notice will be treated as an act of insolvency committed by you.

If, however, you have a counter-claim or set-off, which equals or exceeds the amount claimed by ..... (Creditor) in respect of the Decree or Order and which you could not set up in the suit or other proceedings in which the said Decree or Order was obtained, you must within ..... days intimate the fact to the Court by filing an affidavit.

Dated this ..... day of ..... 19 ..

Judge.

### Acts of Insolvency [Section 9 of Pres. T. Ins. Act ; Sec. 6 Prov. Act]

An act of insolvency is an act which gives a right to a creditor or creditors of the debtor to present a petition for adjudication of the debtor as insolvent.

The following are the acts of insolvency as given in section 9 of the Presidency Towns Act and Sec. 6 of the Provincial Insolvency Acts :—

- (1) If, in India or elsewhere, the debtor makes a transfer of all or substantially all his property to a third party for the benefit of his creditors generally ;
- (2) If, in India or elsewhere, the debtor makes a transfer of his property, or any portion thereof, with intent to defeat or delay his creditors ;
- (3) If, in India or elsewhere, he makes any transfer of his property, or any portion thereof, under such circumstances that the transfer would amount to a fraudulent preference ;
- (4) If, with a view to defeating or delaying his creditors,—
  - (i) he departs or remains out of India ; or
  - (ii) he departs from his dwelling-house or place of business or otherwise absents himself ; or
  - (iii) he lives in seclusion so that his creditors cannot get hold of, or communicate with him ;
- (5) If any of his property has been sold, or attached for not less than 21 days, in execution of a decree of any Court for payment of money ;
- (6) If he himself petitions the Court that he may be declared an insolvent ;
- (7) If he is imprisoned in execution of the decree of any court for the payment of money ;

- (8) If he gives notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts.
- (9) If, after a creditor has served an insolvency notice on the debtor with regard to any decree or order for payment of money, the debtor does not, within the period mentioned in the notice, comply with the notice, unless the debtor has a counter-claim or set-off against the creditor for an amount at least equal to the amount of his debt which the debtor has to pay, and which he could not set up in the legal proceeding in which the Court passed the order against him.

An act of insolvency committed by the agent may, under the circumstances, bind the principal. (Explanation to Sec. 9 Pres. T. I. Act ; Sec. 6 Prov. Insolvency Act.)

An *insolvency notice* is a notice given by the Court at the instance of a creditor to the debtor concerned, calling upon the debtor to pay to the creditor or his agent the amount of the debt due on a decree or order obtained by the creditor against the debtor, or to furnish satisfactory security for the payment of the same, and mentioning that the failure to pay this amount or give security will be treated as an act of insolvency by the debtor unless the debtor has a counter claim or set-off equal to or exceeding the amount of the debt.

### Transfer of Property by the Debtor

If in India or elsewhere, the debtor transfers all or substantially all of his property to a third person for the benefit of his creditors generally, but without the creditors' unanimous consent, he is said to have committed an act of insolvency which would entitle the creditors to present an insolvency petition against him. Even if a majority of the creditors agree to such a transfer, it would be an act of insolvency ; and all such creditors who did not agree to such transfer would be entitled to present an insolvency petition against the debtor. But those creditors who consented to the trust cannot treat it as an act of insolvency, except by showing that the assent had been obtained by fraud by the insolvent, or that by the deed of composition any undue advantage was given to any one creditor over the others, or unless the creditor or creditors wishing to revoke the assent show that the revocation of the assent to the composition did take place before the actual execution of the deed. [Re Mills, 1906, 1 K. B. 389.]

An act of insolvency can be proved even by producing in evidence an unregistered or unstamped composition deed. (*Ex parte Heapy*, 1889, 6 Mor. 66.)

### Fraudulent Preference [Secs. 56, 57 of Pres. T. I. Act ; Sec. 54 of Prov. I. Act]

Section 56 of the Presidency Towns Insolvency Act of 1909 and Section 54 of the Provincial Insolvency Act of 1920 lay down that every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money, in favour of his creditor, with the intention of giving that creditor a preference over the other creditors, shall, if such person is

adjudged insolvent on a petition presented before the Court **within 3 months** after the date thereof, be deemed fraudulent and **void as against the Official Assignee, or the Receiver, as the case may be.**

In order that a payment or a transfer by the debtor may be set aside by the Official Assignee or the Official Receiver, it must be shown that the payment or the transfer was **to a creditor** and that at the time of the transfer or payment, the debtor was in insolvent condition, and that the debtor **voluntarily** transferred the property, *i.e.*, without any coercion (pressure) exercised on him by a creditor, and that he **intended to prefer** that particular creditor to the general body of creditors. The payment must have been made within three months of the petition. A, a debtor, makes a payment to X his cousin who is his creditor, **without the cousin exercising any pressure on him** to make the payment; A's **intention is to prefer** his cousin to the rest of the creditors. A has committed a fraudulent preference, and if the insolvency petition is presented by the other creditors within three months from the date of this payment by A to his cousin, the Official Assignee, or the Receiver, as the case may be, can claim the amount of the payment from the cousin and utilise it for the benefit generally of the creditors. If, on the other hand, A was **pressed** heavily or coerced by the cousin, A's act would not amount to a fraudulent preference, for it is of the essence of the fraudulent preference that the transfer or payment must have been made **voluntarily** by the debtor.

### Remaining out of India

If a debtor, with an intention of defeating the jurisdiction of the Courts in India, leaves India, he would be guilty of having committed an act of insolvency. A leaves Bombay for Karachi having committed debts in Bombay. If A's intention in leaving Bombay for Karachi was to escape the jurisdiction of the Court in Bombay, A can be regarded guilty of having committed an act of insolvency. (See *S. Darby & Co. v. Official Assignee, Bombay*, 1928, 30 Bom. L.R. 290.)

### Intimation to Creditors about suspension of Payment

If the debtor **gives notice** to his creditors that he has suspended payment, or that he is about to suspend payment, of his debts, he would be guilty of an act of insolvency. But the actual suspension of payment **without a notice** having been given to the creditors about the suspension of payment would not amount to an act of insolvency.

If A suspends payment of his debt A has not committed an act of insolvency, **unless he has given notice of such suspension.** A declares to P (an outsider who is not creditor) that he is unable to pay his creditors. A has not committed any act of insolvency because the declaration of the inability to pay his creditors has not been made to any creditor of A, but to P a non-creditor. (*Vasanji v. Mulji*, 1920, 28 Bom L. R. 677.)

### **Adjudication Order [Sec. 10 of the Pres. T. Insol. Act ; Sect. 7 of the Prov. Ins. Act]**

The Court **may, if it is satisfied** that the requirements of the Insolvency Act concerned have been satisfied and that it is fit and proper to have the debtor adjudicated insolvent, adjudicate the debtor an insolvent. The order of the Court declaring the debtor an insolvent is called the **order of adjudication**. In the case of the Presidency-towns, notice of every order of adjudication, stating the name, description and address of the insolvent, the date of adjudication, the date at which the petition was presented, the Court which passed the adjudication order, shall be published in the local official Gazette in such mode as may be prescribed by the Rules ; under the Provincial Act, the same must be published in the local official Gazette in such mode as may be prescribed by the Rules.

### **Consequences of the Adjudication Order [Secs. 17, 21, 22, 30, 41, Pres. T. I. Act ; Secs. 28, 35, & 43, Prov. I. Act]**

Upon an adjudication order, the property of the insolvent, **except exempted property which is non-attachable, becomes vested in an officer known as the Official Assignee (in case of Presidency-towns) or the Receiver (in the case of places outside the Presidency-towns)**, and is divisible among the creditors of the insolvent, according to the provisions of the Insolvency Law. As to whether property of the insolvent, situate outside India, is vested in the Official Assignee or the Receiver, there is some doubt, but the better view is that movable property does so vest, but immovable property does not so get vested unless the foreign law permits that. (*Yokohama Specie Bank v. Curlenders Co.*, 43 Cal. L. J. 436). Another important consequence of adjudication is that no creditor can during the pendency of the insolvency, have any remedy against the property of the insolvent with regard to debts, and no creditor of the insolvent can, during the insolvency, commence any suit or other legal proceedings against the insolvent, except with the leave of the insolvency Court and on such terms and conditions as the Court may impose. After the insolvency is over, suits can be brought by the creditors. The secured creditors are always safe with their securities, *i.e.* the property charged in their favour. But even they have to file suits against the Official Assignee or Receiver. (29 Bom. L. R. 882.) Another important consequence of the adjudication order against the insolvent is that he shall be disqualified from being appointed or from acting as a magistrate or from being elected to any office of any local body or municipality where the appointment is by election or is honorary, *i.e.*, without any salary attached to it, or from being elected or from sitting or voting as a member of any local or municipal authority, but this disqualification ceases when the order of adjudication is annulled or the insolvent obtains from the Court an order of discharge, with a certificate that the insolvency

was caused by misfortune and not by any misconduct on the part of the insolvent. An undischarged insolvent cannot act as a director of the company. Even a discharged insolvent cannot have his name restored to the Register of Accountants, if he is an accountant or an auditor, unless he has obtained, after his discharge, a certificate from the Insolvency Judge that his insolvency was caused by misfortune and not by his misconduct. An undischarged insolvent cannot act as a director of a Company registered under the Companies Act. Under the Presidency-towns Act the Court may appoint special manager to help the Official Assignee. Secs. 17, 21, 22, 30 and 41 of Pres. T. Act ; Secs. 28, 35, 43, Prov. Act.

### Protection Order

If the insolvent has submitted his schedule giving the list of all of his creditors and the amount of debts due and owing to them, he may apply to the Court for a protection order, *i.e.* an order from the Court making him immune from arrest or harassment by his creditors in execution of decrees or other legal process. **As a rule** a Protection Order is made **after** the schedule has been filed by the insolvent with the official assignee or the receiver, as the case may be. But a Court may make **an interim** Protection Order, or a regular Protection Order, **even before the insolvent has filed the schedule if the Court thinks it necessary to do so.** The effect of the protection order is that it protects the insolvent from being arrested by the creditors for any debt to which such protection order applies. [Sec. 25, Pres.T. Insolv. Act.]

Under the Provincial Insolvency Act, which applies to places other than the Presidency-towns, the protection order is made by the Court **at the time of making an order admitting the petition, or at any time before the adjudication order is made,** if the debtor is under arrest or is imprisoned in execution of the decree of any Court for payment of money. Thus adjudication may take place on the same day of the filing of the petition. After adjudication, the insolvent may apply to the Court for protection and the Court may make an order protecting the insolvent from arrest or imprisonment [Imprisonment means, imprisonment in the civil prison meant for debtors.] Section 31 of the Provincial Insolvency Act. Under the Provincial Insolvency Act we have no section providing for interim protection order.

### PROPERTY OF THE INSOLVENT

and

#### After-acquired Property—The Rule in *Cohen v. Mitchell*

The property of the insolvent [except **exempted property** such as the insolvent's wearing apparel, cooking utensils, tools of trade by which he earns his living, to the extent of a value allowed by the

Court] becomes vested in the Official Assignee or the Receiver, as the case may be. This is the property which the insolvent possesses **at the time of adjudication** ; but the insolvent may get property even after the adjudication order, *e.g.*, by legacy. This is known as **after-acquired property**. As regards after-acquired property, it has been held, following the English law rule in *Cohen v. Mitchell*, (1890, 25 Q. B. D. 262), that in the case of the presidency-towns, the official assignee **cannot get that property automatically ; he has to intervene and claim it** ; but outside the presidency-towns, the insolvent's after-acquired property becomes **automatically vested in the Receiver who need not claim it** ; the rule in *Cohen v. Mitchell* has been applied by the High Courts in India (*Alimahmed v. Vadilal*, 43 Bom. 890) to transactions made in good faith and for value. See also *Chotalal v. Kedarnath*, 1924, 46 All. 565 ; *Dasarathy v. Mahamulyar*, 1920, 47 Cal. 961. But the Madras High Court has held that the rule in *Cohen v. Mitchell* does not apply to immovable property. (*Rowlandson v. Champion*, 1894, 17 Mad. 21.)

Property held by the insolvent **in trust** for another person (who is beneficiary), or tools of trade, the cooking vessels and furniture of the insolvent, his wife or children, the necessary wearing apparel, bedding, of the insolvent is not divisible amongst the creditors, provided the value of such property does not exceed the amount prescribed by the Rules [Sec. 28 of the Prov. I. Act ; Sec. 52 of Pres.-T. Act.]

The property that is divisible among the creditors of the insolvent includes all such property as the insolvent has at the time of the commencement of the insolvency, or as may be acquired or devolve upon him at the time after adjudication but before discharge.

**The Doctrine of Reputed Ownership [Sec. 51 of Pres. T. Ins. Act ; Sec. 28 (7) Prov. Ins. Act]**

Under the doctrine of reputed ownership, property **belonging to a third person, but voluntarily left by him with the insolvent, without any distinguishing mark or label thereon showing that it is not the property of the insolvent, under such circumstances that the members of the public and others dealing with the insolvent can take it that the third party's property is the insolvent's property**, can be taken by the official assignee or the receiver **as if it were the property of the insolvent himself**. If A leaves his own goods with B, a trader, under such circumstances that he voluntarily allows the goods to remain with the trader in his disposition and power and without doing anything to show that they are A's goods and not B's, and if when B, the trader, becomes insolvent, A's goods are still there with B, B's Official Assignee or the Receiver, as the case may be, can claim for distribution amongst the creditors of B, A's property also with B's property, **because A, by carelessly allowing such property to remain with B, was instrumental in creating in the minds of the persons dealing with B the impression that the goods were B's.**

This doctrine **applies only to goods in a commercial dealing** ; but it does not apply to goods like furniture taken on hire-purchase, *e.g.*, where a hotel-keeper has his furniture taken on hire-purchase ; nor does it apply to repairers, *del credere* and commission agents, keeping goods belonging to other persons for repairs, sale or pledge. The doctrine **does not apply to immovable property or fixtures**. Property held by trustees is **not subject** to this doctrine, because the trustee is the **true owner**, and **not the reputed owner**. The doctrine of reputed ownership does not apply to goods in the hands of executors, executors *de ses torts*, administrators, administrators *de ses torts*, factors for sale of goods, commission agents and repairers.

When a third person's property is taken by the Official Assignee or the Receiver, as the case may be, for distribution among the creditors of the insolvent, the right of the third party is to prove for the value of his goods in the insolvency of the insolvent. The third party can lodge his claim with the Official Assignee or the Receiver, as the case may be, and may have to take by proportionate abatement where the property of the insolvent is not sufficient to satisfy the debts and claims of the creditors.

**Commencement of Insolvency, and the Doctrine of Relation Back**  
[Sec. 51 of Pres.-T. Ins. Act ; and Sec. 28 of the Prov. Ins. Act]

In the case of the presidency-towns, under sec. 51 of the Presidency-Towns Insolvency Act, the insolvency of a debtor **commences from and relates back to the date of the commission of the first act of Insolvency within the three months of the presentation of the petition**. In the case of places outside the presidency-towns, *i.e.*, under sec. 28 of the Provincial Insolvency Act, the insolvency starts from the date of the presentation of the petition on which the adjudication order was passed.

**The Doctrine of Protected Transactions** [Sec. 57, Pres.-T. Ins. Act ; Sec. 55, Prov. Act]

Subject to the provisions of the Insolvency Law with regard to the effect of insolvency on an execution and the avoidance of transfers and preferences, the Insolvency Law does not invalidate the following transactions :—

- (1) Any contract or dealing by or with the insolvent for valuable consideration ;
- (2) Any payment to any of his creditors by the insolvent ;
- (3) Any payment or delivery to the insolvent ;
- (4) Any transfer by the insolvent for valuable consideration.

Provided any such transaction (mentioned above) takes place **before the date of the adjudication of the person concerned**, and provided the person with whom the transaction is entered into **does not at the time have notice of the presentation of insolvency petition by or against the debtor**.

**Voluntary Transfer [Sec. 55, Presidency-towns Act; Sec. 53, Provincial Insolvency Act]**

It is a transfer **without consideration**. Any transfer (not being a transfer in consideration of marriage, or in favour of a purchaser or incumbrancer in good faith and for valuable consideration), made without consideration shall be void as against the Official Assignee or the Receiver, if the transferor is declared insolvent within a period of two years after the date of the transfer. Under the Presidency-towns Insolvency Act which applies to the presidency-towns, the transfer that is voluntary will be void as against the Official Assignee, if the adjudication takes place within two years from the date of the transfer ; but under the Provincial Insolvency Act, which applies to places outside the presidency-towns, the voluntary transfer shall be void as against the Receiver if a petition for adjudication is presented within two years from the date of the voluntary transfer. [Sec. 55 of Presidency-towns Insolvency Act ; and Sec. 53, Provincial Insolvency Act.]

**Fraudulent Transfer, Fraudulent Preference, and Voluntary Transfer, Distinguished**

**A voluntary transfer is a transfer without consideration—a transfer by gift.** Such a transfer can be avoided by the Official Assignee, or by the Receiver, if the adjudication order is made (in the case of the presidency-towns), or the insolvency petition is presented (in the case of the places outside the presidency-towns), **within two years from the date of the transfer.** For a transfer for consideration, the period is **three months** (and not two years).

A fraudulent transfer is a transfer made by the debtor to some person (whether a creditor or a non-creditor) **with a view to escaping his creditors.** The idea of the debtor is that of nominally transferring the property (fraudulent benami transaction), but of **keeping the benefit to, and the fruits and yields of, the property for himself.** The transferee, though the legal owner, is simply a **sham holder for the benefit of the debtor.** Every fraudulent preference is a fraudulent transfer, but every fraudulent transfer is not a fraudulent preference.

A fraudulent preference (or a fraudulent transfer amounting to fraudulent preference) is a transfer made by the debtor to a creditor, **deliberately (and not under pressure) with a view to giving preference to that creditor over the rest of the creditors.** The debtor **does not retain** any benefit or right in the property for himself ; and the transfer is **always to a creditor.**

**Disclaimer of Onerous Property [Sec. 62 of the Presidency-towns Insolvency Act]**

In the case of the presidency-towns, where the Presidency-towns Insolvency Act applies, **the Official Assignee has got the power**



to disclaim onerous property, *i.e.*, property consisting of land burdened with onerous covenants or of shares or stock in companies on which calls may be made by the liquidator or by the directors or of unprofitable contracts or other property that is not readily saleable. The disclaimer by the Official Assignee can take place by writing signed by him at any time within 12 months from the date of the adjudication order against the insolvent, but if the Official Assignee did not know of the existence of such onerous property within one month after the adjudication, he may disclaim such onerous property at any time within 12 months after he first came to know of the existence of such property. The Official Assignee should, within a reasonable time, decide whether he will accept or disclaim the contract. (*Grey v. Walker*, 40 Cal. 523).

A is a tenant under lease with one B. A becomes insolvent. The Official Assignee can disclaim the lease between A and B; and the remedy available to the landlord is that of proving for the damage suffered by him, by the disclaimer, against the Official Assignee, as an ordinary creditor. [Sec. 62 of the Presidency-towns Insolvency Act.]

A person who is affected by the exercise of the right of disclaimer by the Official Assignee, shall be considered a creditor of the insolvent to the extent of the damage suffered by him and can prove for the same as a debt under insolvency. (Sec. 62)

Subject to the rules as may be made in this connection, the Official Assignee is **not entitled to disclaim any leasehold interest without the leave of the Court.**

### **Filing of the Schedule by the Insolvent [Sec. 24 of Presidency-towns Insolvency Act]**

#### **[In the Presidency-towns]**

Within 30 days from the date of the adjudication order (if the order is made on the debtor's petition), or within 30 days from the date of the service of the order on the insolvent (if the order is made on a creditor's petition), the debtor (insolvent) **must submit his schedule to the Official Assignee.** The schedule must be **verified by an affidavit.** The protection order is made, as a rule, after the insolvent has filed the schedule. In the schedule the insolvent must state truthfully the name of each of his creditors, mortgagees, the amount of the debts or their claims. If the insolvent does not file a complete and proper schedule, the Official Assignee may, at the expense of the estate of the insolvent, have such schedule prepared in the manner prescribed [Sec. 24]. If without any reasonable excuse the insolvent fails to file a proper schedule, the Court may commit the insolvent to prison.

**Schedule of Creditors [Sec. 33 of Provincial Insolvency Act]****[Outside the Presidency-towns]**

Upon the adjudication of a debtor as insolvent, all persons who claim to be creditors of the insolvent, with regard to all debts provable under Insolvency law, must tender proof of their debts, giving particulars of the debts, and must file their statement with the Receiver. The Court shall then determine the proof (to be the creditors of the insolvent), and the amount of the debts, and then it shall frame a schedule of all such persons who are creditors, with their debts. [Sec. 33 of Provincial Insolvency Act].

**Duties of the Insolvent [Secs. 33, 34 of Presidency-towns Insolvency Act ; Secs. 22, 28, 60 of the Provincial Insolvency Act]**

The duties of the insolvent are as follows :—

- (1) He must, unless prevented by illness or some other just ground, attend meetings of his creditors when the Official Assignee, or the Receiver, requires him to so attend, and he must render all such information as may lawfully be required of him at the meeting.
- (2) He must give a proper inventory of his property and his creditors and debtors and the debts due to and from them respectively.
- (3) He must make such lawful transfers and execute such powers-of-attorney and instruments as the Official Assignee or the Receiver may lawfully require of him to do.
- (4) He must attend at such times and places on the Official Assignee, or the Special Manager appointed to help the Official Assignee, as he may be required to attend.
- (5) He must do all such acts with regard to the distribution of his property among his creditors as may be required of him by the Official Assignee, or the Special Manager, or by the Court, or under the rules made by the Court.
- (6) He must, according to the best of his ability, assist the Official Assignee or the Special Manager, in the realization of his property and the distribution of the proceeds of the same among his creditors.
- (7) Even after his discharge he is required to give such assistance to the Official Assignee as the latter may require of him with regard to the realization and distribution of his property. Failure to fulfil any of his duties will make him liable for contempt of Court and his discharge may be revoked by the Court.

**Public Examination of the Insolvent [Sec. 27, Presidency-towns  
Insolvency Act ; Sec. 24, Provincial Insolvency Act]**

In the case of the presidency-towns, when the Court makes an order of adjudication, it appoints a day for holding what is known as the public examination of the insolvent. Notice of the holding of the public examination of the insolvent must be given to creditors in the manner prescribed by the rules made by the Court. The insolvent must attend at the public examination **the object of which is to determine the cause which led to the insolvency.** This examination must be held as soon as convenient and possible after the expiration of 30 days from the adjudication order. Creditors are entitled to appear at the public examination of the insolvent after tendering a proof of their claim ; they may employ legal practitioner to appear on their behalf. The Official Assignee must take part in the examination of the insolvent. The insolvent must be examined on oath and it shall be the duty of the insolvent to answer truthfully all such questions as are put to him.

Where the insolvent is a lunatic or suffers from mental or physical affliction or is otherwise disabled, the Court may, if it thinks fit and proper, dispense with the holding of the public examination. The same will be the case in the case of a pardanashin woman.

Under the Provincial Insolvency Act which applies to places outside the presidency-towns, the Court must examine the debtor while the petition is heard by the Court, regarding the debtor's conduct, dealing and property. Such examination by the Court shall be in the presence of such creditors as are present at the hearing of the petition for adjudication. The creditor, or his lawyer, can question the debtor, and the Court will allow such questions as are fit. As a rule, an application for public examination of the Insolvent, should not be granted after the insolvent's application for discharge is placed for hearing. (Re Daruwalla, 26 Bom. L. R. 627).

**Private Examination [Sec. 36 of Presidency-towns Insolvency Act ;  
Sec. 59A, Provincial Insolvency Act]**

The Court may, on the application made by the Official Assignee, or by the Receiver, or by any creditor who has proved his debt, at any time after an adjudication, **summon before it the insolvent or any other person suspected or known or alleged to be in possession of any property belonging to the insolvent or indebted to the insolvent, or capable of giving information which may throw light on the insolvency, or any person whom the Court may consider capable of giving information regarding the insolvent's affairs or property.** If the person summoned before the Court does not appear before the Court though given proper travelling allowance or expenses, he may be apprehended by a warrant issued by the Court and brought

before the Court for examination. [Sec. 36 (1), (2), (3) of the Presidency-towns Insolvency Act and Sec. 59A of the Provincial Insolvency Act]. If on an examination, under the Presidency-towns Act, any person admits that he is indebted to the insolvent, the Court may, on the application made to it by the Official Assignee, order him to pay to the Official Assignee the amount of the debt or any portion thereof. Likewise can an order be made by the Court on any person regarding property belonging to the insolvent. Such orders can be executed as decrees of law Courts. [Sec. 36 of the Presidency-towns Insolvency Act.]

On this topic, the points of difference between the Presidency-towns Insolvency Act and the Provincial Insolvency Act are as follows :—

Whereas under the Presidency-Towns Insolvency Act, the Court may summon any person for examination in chambers (in private), it is different under the Provincial Act. Under **the Provincial Insolvency Act**, the Court may summon a person for examination in private, **only if it is specially empowered, in that respect, by an order of the State Government concerned.**

Sec. 36 (4), (5), (6), (7) is peculiar to the presidency-towns in its application ; there are no similar provisions under the Provincial Insolvency Act.

An examination in private, under Sec. 36 (Presidency-towns Act) can be held even after the discharge of the insolvent. (*Shadan v. Shivnarayan*, 60 Cal. 936.)

#### **Powers of Official Assignee/Receiver [Sec. 68, Presidency-towns Act ; Sec. 59 of Provincial Insolvency Act]**

The following are the powers of Official Assignee/Receiver :—

- (1) He can, **with the leave of the Court**, institute, continue or defend any suit or legal proceedings relating to the property of the insolvent.
- (2) He can, with a view to realising the property of the insolvent, sell any property of the insolvent and give receipts for moneys received by him.
- (3) **With the leave of the Court**, he can exercise any of the following powers :—
  - (a) do the business of the insolvent so far as may be necessary for a beneficial winding-up of the same (but not as if it were a going concern) ;

- (b) accept, as consideration for sale of any property of the insolvent, a sum of money payable in future or even fully paid shares, debentures, or debenture stock, in any limited company, subject to such stipulations as to security and otherwise, as the Court may impose ;
- (c) mortgage or pledge any property of the insolvent for raising money for payment of insolvent's debts, or for carrying on the business with a view to beneficial winding-up of the business ;
- (d) refer any dispute to arbitration, and compromise debts, claims and liabilities ;
- (e) employ a legal practitioner or other agent to take any proceedings, or do any business sanctioned by the Court ;
- (f) divide in its existing form amongst the insolvent's creditors, according to its estimated value, any property which cannot readily or advantageously be sold.

#### **Duties of the Official Assignee, or the Receiver**

It is the duty of the Official Assignee/Receiver to realise with all convenient speed the property of the insolvent. It is his duty to pay over all moneys received by him according to the rules made by the Court and to account to the Court in respect of such moneys and the work done by him as Official Assignee. It is his duty to pay regard to the wishes of the creditors disclosed to him through the Committee of Inspection. He should not give any preference to any particular creditor, and should distribute the debts impartially. When a scheme of arrangement is proposed by the debtor to him it is his duty to call a meeting of the creditors to determine whether the creditors would approve of the scheme. It is then his duty to submit the scheme to the Court for the consideration of the Court. It is his duty to be present at the public examination of the insolvent and to take notes of the proceedings and to ask such questions of the insolvent as may be necessary and fit.

#### **Meetings of Creditors [Sec. 26 of the Presidency-towns Insolvency Act]**

The Court may, at any time after the making of an order of adjudication, and upon the application of the Official Assignee or a creditor of the insolvent, direct that a meeting of creditors be held to consider the causes of the insolvency, the circumstances of the insolvency and the insolvent's schedule and the mode of dealing with the insolvent's estate. [Secs. 26, 38 and 85, Presidency-towns Insolvency Act]. Sec. 85 (1) of the Presidency-towns Insolvency

Act provides that subject to the Act and the directions of the Court, the Official Assignee must, in the administration of the insolvent's property and in the distribution thereof amongst his creditors, have regard to the resolutions of the creditors passed at their meeting.

**Committee of Inspection [Secs. 88, 89 of Presidency-towns Insolvency Act ; Sec. 67A, Provincial Insolvency Act]**

If it thinks fit, the Court may authorise the creditors who have proved their debts to appoint from among themselves or from holders of proxies or powers-of-attorney from them, a committee to be known as the Committee of Inspection, with a view to conveying to the Official Assignee or the Receiver, as the case may be, the wishes of the creditors, and also with a view to superintending the work done by the Official Assignee in the administration of the property of the insolvent. The Committee shall have such powers of control over the proceedings of the Official Assignee or Receiver as may be prescribed. (Sec. 89 of Presidency-towns Act, and Sec. 67A, Provincial Act.)

**“Composition” and “Scheme of Arrangement”**

After the Order of Adjudication is made against him, an insolvent may submit to the Official Assignee a scheme of arrangement of his affairs in the prescribed form or a proposal for composition of his debts. It is the duty of the Official Assignee to refer the scheme, or the composition, to a meeting of creditors, which must be called for the purpose of considering the scheme. If at the meeting of the creditors, the majority in number and three-fourths in value of the creditors, whose debts are proved, determine to accept the insolvent's proposal, the proposal will be deemed to be passed and accepted by the creditors. (Sec. 28, Presidency-towns Insolvency Act.) After that the insolvent or the Official Assignee may apply to the Court for approval of the proposal. Notice of the time fixed for the hearing of the application for sanction by the Court of the proposal must be given to each creditor who has proved his claim. Such application will not be heard unless and until the public examination of the insolvent has been dispensed with by the Court or unless the estate is administered as a small insolvency. Creditors may oppose the scheme and put their objections before the Court. Before giving its sanction to the proposal, the Court will hear from the Official Assignee as to the conduct of the insolvent and also all such objections as may be put before the Court for or on behalf of any creditor. If after hearing the creditors and the Official Assignee, the Court is of the opinion that the proposal is not reasonable and beneficial to the creditors, it will refuse to approve the proposal. Sub-section 5 of Section 29 of the Presidency Towns Insolvency Act provides that where any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's

discharge, the court shall refuse to approve the proposal for composition or the scheme of arrangement, unless it provides reasonable security for payment of **at least four annas in the rupee** on all the unsecured debts provable against the debtor's estate ; and sub-section 6 of that section provides that no composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be paid in the distribution of the property of the insolvent.

Under the Provincial Insolvency Act, section 38, the law is the same, except that when any facts are proved, on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge, the Court shall refuse to approve the proposal for composition or scheme of arrangement unless it provides reasonable security **for payment of not less than six annas in the rupee** on all the unsecured debts provable against the debtor's estate. This is a point of difference, in this respect under the Presidency towns Insolvency and the Provincial Insolvency Acts. Secondly a composition is binding only on those creditors whose names are entered in the schedule—to the extent of their debts therein entered.

#### **Difference between "Composition" (Composition of Debts) and "Scheme of Arrangement of Affairs" (Scheme of Arrangement)**

(1) In **Composition** there is an actual payment by the debtor (to the creditors) of an amount (in settlement and satisfaction) **less than** what was actually due by the insolvent. In a **scheme of arrangement**, the debtor **arranges** with his creditors **to liquidate, in due course of time, the amounts due to them.**

(2) A composition is of **debts**. A scheme of arrangement relates to the **insolvent's affairs**.

If the Court sanctions the proposal, its terms shall be embodied in the Court's order, and the adjudication would be annulled.

If the debtor defaults in paying any instalment due under a composition or scheme approved of by the Court, or if the Court finds that the composition or scheme cannot be carried on without injustice or unnecessary delay, or that its approval was obtained by fraud, it may re-adjudge the debtor insolvent. The composition or the scheme would then stand annulled. [Sec. 31 of the Presidency-towns Insolvency Act.]

#### **Annulment of Adjudication [Secs. 21-23 of Presidency-towns Insolvency Act ; and Secs. 35-37 of Provincial Insolvency Act]**

The adjudication order would be annulled by the Court if it is found that the adjudication was improper and that the debtor ought not to have been adjudged insolvent. Adjudication can be

annulled on the ground that the debts are paid in full. When the Court finds that the insolvency proceedings are taken against the same person in another Indian Court, and that the property of the debtor can be distributed with greater facility by that Court, the Court may annul the Adjudication Order made by it, or it may postpone for the time being all proceedings in the insolvency. Another ground on which annulment of the adjudication can take place is, where the Court approves a scheme of arrangement or composition; when the Court approves the same, it will annul the adjudication order. The adjudication of an insolvent may also be annulled if the insolvent does not appear on the day appointed for the hearing of his application for discharge or if he does not apply to the Court for an order of discharge within the time prescribed. [Secs. 21-23 of Presidency-towns Insolvency Act; Secs. 35-37, Provincial Insolvency Act.]

Though an adjudication may be annulled, yet all transactions like disposition of property, sales and all payments duly made and all acts done by the Court or by the Receiver or the Special Manager, shall be and shall remain valid. [Sec. 18A of Presidency-towns Insolvency Act; Sec. 37 (1) of Provincial Insolvency Act.]

**Proof of Debts [Secs. 46, 47, 48, 50 of Presidency-towns Insolvency Act; Sec. 34 (2) of Provincial Insolvency Act; also Secs. 45-50]**

Every creditor is required to lodge his proof of debt as soon as may be after the making of the adjudication order. The proof must be lodged in the manner prescribed by the rules of the High Court concerned. A secured creditor need not lodge any proof, unless having realised his security he proves for the balance due to him, or as soon as he abandons his security for the benefit of the creditors generally (in which case he may prove for the whole debt as an ordinary creditor). But if a secured creditor does not give up his security or realise, it is his duty to state in his proof the particulars of property secured including the value of the property, if he at all ranks and proves for a dividend. He can then have a dividend after the value of the security is deducted from his claim.

A creditor can also prove for interest on the amount of the debt as agreed, or if not reserved or agreed beforehand, then at the rate of six per cent. per annum, provided the debt or the sum is payable under a written instrument at a certain time, or, if payable otherwise, from the time a demand in writing is made for the payment of the interest. As regards interest **after the adjudication order**, it cannot be claimed **unless there is a surplus left after the creditors are paid in full their debts**. When there is such surplus left, it shall be used in payment of interest from the date of the adjudication order at six per cent per annum on all debts proved in insolvency.



schedule filed by the insolvent, and who has not proved his debt till then. After declaring dividend he must send to each creditor, who has proved, notice stating the amount and the mode of the payment of the dividend.

The Official Assignee or the Receiver is entitled to, and must, keep in his own hands sufficient assets to meet the following claims :—

- (a) Disputed proofs and claims ;
- (b) Cost, charges and expenses of administration of the estate of the insolvent ;
- (c) Debts provable in the insolvency, but not yet determined to be admissible ;
- (d) Debts which are provable in insolvency and due to persons resident in places so far away that they had no time to tender their proof before the distribution of dividends.

Any creditor who failed to prove his debt before declaration of a dividend can claim to be paid out of any money in the hands of the Official Assignee any dividend which he did not receive, unless that money is applied to the payment of a future dividend. When a dividend has remained unclaimed by the creditor for a period of 15 years from the date of its declaration or such lesser period as may be prescribed, the Official Assignee having such dividend in his hands shall pay the same to the credit of the Central Government, unless the Court has otherwise directed. Any creditor entitled to any money so paid to the credit of the Central Government can apply to the Court praying that the money he claims be paid to him; and if the Court is satisfied that he is really entitled it shall order the payment, from the account of the Central Government, of such money to him.

Because a dividend in the possession<sup>a</sup> of an Official Assignee, or the Receiver, cannot be regarded as a debt, in the ordinary sense (*Prout v. Gregory*, 1889, 24 Q. B. D. 881), no suit can lie against the Official Assignee or the Receiver at the instance of a creditor for the payment to the creditor of such amount of dividend. The aggrieved creditor, however, can apply to the Court stating that the Official Assignee or the Receiver has wrongfully refused to pay the dividend and that the Court may order the Officer to pay it to him. If the Court finds that the Official Assignee or the Receiver wrongfully abstained from paying the amount of the dividend to the creditor who is really entitled to it, the Court will order the Official Assignee or the Receiver to pay the dividend, and to pay of his own money interest thereon at such rate as may be prescribed and also the costs of the creditor's application. (Sec. 74, Presidency-towns Insolvency Act ; Sec. 65, Provincial Insolvency Act.)

**Discharge of Insolvent [Secs. 38-45 of the Presidency-towns Insolvency Act ; and Secs. 27, 41, 42, 43, 44, of Provincial Insolvency Act]**

At any time after the order of adjudication is made against him, the insolvent can apply to the Court praying for his discharge. The Court then appoints a day for hearing the application for discharge. **As a rule** the application for discharge will not be heard ; but where the public examination of the insolvent has not been held ; but where the public examination has been dispensed with, the Court can hear the application for the discharge of the insolvent. Under the Provincial Insolvency Act, the Court has got to specify a period of time within which the insolvent must apply for his discharge. On the application made by an insolvent for discharge the Court will consider the report made to it by the Official Assignee or the Receiver, and will be guided by such report though not binding on the Court.

After hearing the parties concerned, and after taking into consideration the report of the Official Assignee or the Receiver as to the conduct of the insolvent and his affairs in insolvency or otherwise, the Court may grant an **absolute** discharge, or a **conditional** discharge, or may **refuse** to grant an absolute discharge and allow only a conditional discharge, or may suspend the operation of the order for a specified period of time. The Court must refuse to grant the discharge if the insolvent has committed an offence punishable under the Insolvency Act or under Sections 421-424 of the Indian Penal Code. If the insolvent's assets are not of the value equalling 4 annas in the rupee on his unsecured liabilities (unless the insolvent satisfies the Court that he cannot be held responsible for the assets being not equivalent to 4 annas in the rupee), or if the insolvent has failed to keep the usual and proper books of account with regard to the business carried on by him within three years immediately preceding his insolvency or if he has continued to trade or do business even after knowing that he has been declared insolvent, (unless he took the leave of the Court) or if he has failed to account for the loss of assets to meet his liabilities, or if he has contracted any debt without having reasonable or proper grounds to expect that he would be able to pay the same, or if his insolvency has been caused by speculation, extravagance or gambling, or by culpable neglect of his business affairs or if he has put any of his creditor to undue expenditure by any false defence to any suit properly brought against him by the creditor or creditors, or if he has within three months preceding the presentation of the insolvency petition against him entered into unnecessary expenditure by bringing a false suit, or if he has within three months prior to the date of the presentation of the insolvency petition against him been guilty of any undue preference to any of his creditors, or if he has concealed or done away with any of his books or property or any part of his books or property or committed fraud.

or fraudulent breach of trust, the Court may refuse to allow his discharge or may suspend his discharge for the specified time or till a dividend of not less than 4 annas in the rupee is paid by him to his creditors, or the Court may require him to consent to a decree being made against him in favour of the Official Assignee for any debt or debts provable under the insolvency, but not satisfied at the time of the discharge.

**N.B.**—Under the Provincial Insolvency Act, the Court shall refuse to grant an absolute discharge if the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the Court that the fact of the assets being not of the value of eight annas in the rupee has arisen from causes or circumstances for which he cannot, in justice, be held responsible.

If the Court has refused to allow the discharge, the insolvent can with the permission of the Court renew his application after such time as may be prescribed. [Sec. 8 (1) of Presidency-towns Insolvency Act.]

**Effect of the Order of Discharge [Sec. 45 of Presidency-towns Insolvency Act ; Sec. 44 of Provincial Insolvency Act]**

Upon the Order of Discharge by the Court in favour of an insolvent, he becomes excused from payment of the balance of the debts to his creditors ; but (1) debts due and owing to the Crown, or (2) any debt or liability which was caused by reason of a fraud, or breach of trust (which was fraudulent), of the insolvent, or (3) any debt or liability under an order (under section 488 of the Criminal Procedure Code) for maintenance—will not be excused. Under Section 488 of the Criminal Procedure Code, a minor child or a wife who has been deserted without any lawful cause or excuse, can petition (in a summary manner) for an order for maintenance.

**Penalties under Insolvency Law [Secs. 102-105, Presidency-towns Insolvency Act ; Secs. 69-72, Provincial Insolvency Act]**

If an undischarged insolvent obtains money from anybody to the extent of Rs. 50 or more, without informing the lender that he is an undischarged insolvent, he shall be liable, by reason of his having committed an offence under the Insolvency Law, to imprisonment which may extend to 6 months or with fine or with both. [Sec. 102, Presidency-towns Insolvency Act ; and Sec. 72, Provincial Insolvency Act.]

It is an offence under the Insolvency Law for an insolvent to destroy fraudulently, with the intention of concealing his affairs or defeating the creditors, any books, papers or documents relating to the insolvency. Likewise it is an offence to prevent or withhold

the production of any relevant books or document or documents. Keeping of, or causing to be kept, false books or making false entries or withholding entries or falsifying books throwing light on the insolvent's affairs, amount to offences under the Insolvency Act. Fraudulently, with intent to diminish the sum distributable among the creditors, or with the intention of giving fraudulent or undue preference to any of his creditors, discharging or concealing any debt due to or from him, or making away with, or charging or mortgaging or concealing any part of his property, is also an offence under the insolvency Act. The punishment for these offences is imprisonment for a maximum of two years. (Sec. 103, Presidency-towns Insolvency Act). But under the Provincial Insolvency Act, the maximum punishment is one year's imprisonment. (Sec. 69 of Provincial Insolvency Act.)

The insolvent is not exempt from punishment by reason merely of the fact that he has obtained his discharge or that a composition of his debts or a scheme of arrangement of his affairs has been accepted or approved by the Court. [Sec. 105, Presidency-towns Insolvency Act ; and Sec. 71 of Provincial Insolvency Act.]

#### **Administration in Insolvency of a Deceased Person's Estate** [Secs. 108-111]

In the case of the presidency-towns, the estate of a deceased person can be administered in insolvency as if it were an insolvent's estate. Under the Presidency-towns Insolvency Act, where a probate or letters of administration have not been granted to the Administrator General, any creditor or creditors of a deceased person can apply to the Court, having the jurisdiction, praying that an order for the administration of the deceased person's estate in insolvency may be made. The creditor or the creditors must have a claim of Rs. 500 or more against the deceased's estate, and the Court to which the application is made must be a Court within the limits of whose ordinary civil jurisdiction the deceased had resided or done business for the greater part of the six months immediately prior to his death. (Secs. 111 and 108 (1) and (2) of Presidency-towns Insolvency Act.)

Notice will be given to the legal representatives of the deceased debtor in the way prescribed by the Court. The Court may, if satisfied that the deceased's estate is not sufficient to pay the creditors their claims, order that the estate be administered in insolvency. If, on the other hand, the Court finds that the estate of the deceased is sufficient to pay the debts of the creditors, the Court will see no reason to direct the administration of the estate in insolvency. If an Order is made directing the administration of the estate of the deceased in insolvency, the estate will vest in the Official Assignee who will then proceed to realise and distribute the same as provided by the Presidency-towns Insolvency Act. The estate will be administered by the Official Assignee in the same way as an insolvent's

estate, though the deceased is not and cannot be declared insolvent. The estate, nevertheless, is administered like an insolvent's estate, with certain modifications. (Sec. 109 (2), Presidency-towns Act). The Official Assignee must allow the legal representatives of the deceased, reasonable sums of money for payment of all the necessary and proper funeral and testamentary expenses incurred by them, and these will be deemed preferential claims. [Sec. 109 (3) of Presidency-towns Insolvency Act]. If after paying the debts, any surplus remains, the same shall be paid over to the legal representatives of the deceased, or dealt with as prescribed. [Sec. 109 (4).]

After notice of the petition for administration of the estate in insolvency no transfer made by him shall discharge the legal representatives. [Sec. 110.]

### Small Insolvencies

[Sec. 106, Presidency-towns Act ; Sec. 74, Provincial Act]

Under the Presidency-towns Insolvency Act when the estate of the insolvent debtor is not likely to exceed in value **Rs. 3,000, or such other lesser amount as may be prescribed**, the Court, if satisfied by an affidavit or by the report of the Official Assignee, may order that the estate be administered in a summary manner as a small insolvency ; the Presidency-towns Insolvency Act would then apply, subject to the following modifications :—

- (1) **Unless the creditor or creditors or the Official Assignee applies to the Court for public examination of the insolvent, the insolvent will not be examined ;**
- (2) **As far as possible and practicable, the estate of the insolvent must be distributed in a single dividend ;**
- (3) **No appeal will lie from any order of the Court, unless leave of the Court is granted to make such an appeal ;**
- (4) **And such other modifications as may be prescribed by the Court for the curtailing of expenditure and delay. [Sec. 106 (1) of Presidency-towns Insolvency Act.]**

The Court may at any time revoke the order of summary administration as a small insolvency.

Under the Provincial Insolvency Act, which applies to places outside the presidency-towns, the Court can, on a petition made by or against a debtor, if satisfied, by affidavit or otherwise, that the property of the debtor is **not likely to exceed in value Rs. 500**, order that the estate of the debtor be administered in a summary manner, during the insolvency as a small insolvency. The provisions of the Provincial Insolvency Act will then apply subject to the following modifications :—

1. when the petition is heard by the Court it **must enquire into the debts and assets of the debtor and determine the same by order in writing ;**

2. **as far as possible and practicable** there should be a **single dividend** ;
3. **unless the Court otherwise orders**, the insolvency **will not be gazetted** in the Official Gazette ;
4. the debtor must apply for his discharge **within a period of six months** from the date of adjudication order made against him ; and
5. **such other directions as are prescribed** for saving time and expenditure. [Sec. 74 of Provincial Insolvency Act.]

### Limitation

With regard to an application for annulment of the adjudication order made against the debtor, the debtor can make such application **at any time he likes**. There is **no bar of limitation for such application**.

Provided a debt is **not already time-barred** at the time of adjudication order, time will not run, so far as limitation goes, during the period of the insolvency, *i.e.*, from the date of the adjudication till the date of the discharge or annulment, time will not run for counting the period of limitation. It is only after the discharge of the insolvent or annulment of the insolvency that time will again run for calculating the period of limitation. In the Provincial Insolvency Act section 78 expressly so provides. The difficulty arises when we consider the Presidency-towns Insolvency Act, where there is no such provisions expressly to be found.

Petitions for the avoidance or setting aside of fraudulent preferences, fraudulent transfers and voluntary transfers, can be made **at any time during the pendency of the insolvency proceedings as there is no bar of limitation** for the making of such petitions.

## CHAPTER XXVI

### LAW OF ARBITRATION

[The Indian Arbitration Act, 1940]

#### Introductory

The Indian Arbitration Act, 1940, which came into force on the 1st July 1940, clarifies and consolidates the old Arbitration Law. It amends the following Acts :—

The Religious Endowments Act of 1863 (Sec. 16).

The Specific Relief Act of 1877 (Sec. 21).

Indian Limitation Act (Secs. 150, 159, 170, 179).

Indian Electricity Act (Sec. 52).

Indian Companies Act of 1913 (Sec. 152).

#### “Arbitration Agreement” [Sec. 2]

An “arbitration agreement” is also known as a **submission** or **reference**. An arbitration agreement means an agreement **in writing** to submit a **difference or dispute** to arbitration, whether an arbitrator is named or not. An arbitration cannot now be validly oral. And there must be some **dispute**. (Ladha Singh v. Kalyani, 1939, 2 Cal. 181.)

#### Award

An award means a judgment given by an arbitrator or arbitrators in an arbitration proceeding referred by the parties with their consent.

#### Conditions precedent to Reference to Arbitration

The essentials of a submission are :—

- (1) it must be **in writing** ;
- (2) there must be a **dispute** or **difference** ;
- (3) the dispute must be between two or more parties **who must be sui juris**, *i.e.* competent to contract. (Lunatics or minors cannot refer matters to arbitration.)

#### Distinction between “Arbitration” and “Valuation”

Arbitration **presupposes a dispute** ; Valuation **does not necessarily so**. A valuer is appointed to determine the price of a commodity or of land or building. An arbitration always presupposes some dispute ; but not so in a valuation. A valuer simply declares the value of a thing or of land, but does not give any judgment, but an arbitrator gives his judgment (award) which has got the capacity of being enforced at law. A submission to arbitration requires a stamp paper and must be signed by the parties to the arbitration.

### Submission by or on behalf of minor

A submission signed by a minor is absolutely void ; but a submission **signed on behalf of a minor by his guardian stands on a different footing** altogether and is valid. (*Sadashiv v. Trimbak*, 44 Bom. 202 ; *Vithaldas v. Dattaram*, 26 Bom. 298 ; *Sett v. Hurrolall*, 19 Cal. 334). Under clause 4 of the Second Schedule to the Arbitration Act, 1940, the Court can appoint a guardian for a minor for arbitration proceedings.

Under Order 32, rule 7 of the Code of Civil Procedure, the next friend of a minor or his guardian *ad litem* shall not, without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of the minor. If he acts without such leave his act will not bind the minor even though he be the father and manager of a joint Hindu family. (*Ganesh v. Tuljaram*, 40 I. A. 632). In such a case the minor alone can avoid the award and the decree, but the other party or parties cannot avoid the same. (*Kedar Nath v. Bassant Lal*, 18 Pat. 271, 278). A decree based on an award on such a reference (without leave of the Court) **is not void, but only voidable at the option of the minor.** (*Umer v. Mhabir*, 18 Pat. 708.)

### Reference by Partners in the case of a Firm

Partners may by their partnership agreement agree that any partnership dispute would be decided by arbitration, and such a clause is usually inserted, thus binding the partners *inter se*. But a partner cannot, without special authority, refer a partnership dispute to arbitration, because he has no implied authority to do so. (Sec. 19 of the Indian Partnership Act ; and *Dattubhai v. Vallu*, 1 Bom. L. R. 828.) But a partner, who, without authority, refers a dispute to arbitration, is himself bound by that award, though the other partners may not be liable. (*Bhagwan v. Hiraji*, 34 Bom. L. R. and *Strangford v. Green*, 9 Mad. 228). The other partners may, however, be liable by ratification. (*Thomas v. Atherton*, 10 Ch. D. 185.)

### Reference to Arbitration by Legal Representative [Sec. 6]

Section 6 of the Arbitration Act, 1940, provides that even if a party to a dispute dies before an award is made, the authority of an arbitrator is **not revoked**, and the award made after the death of the party will be binding on the legal representatives of the deceased party. The same applies to arbitration agreement also— which shall not be discharged by the death of a party thereto either as respect the deceased or any other party, but shall be enforceable by or against the legal representative of the deceased.

### Reference to Arbitration by an Agent

An agent cannot refer a matter to arbitration, unless he is authorised to do so. But by his passive acquiescence the principal may



become estopped from denying the agent's authority. (*Saturjit v. Dulhin*, 24 Cal. 469).

**Reference to Arbitration by Counsel or Solicitor.** A solicitor has no implied authority to bind his client by referring a dispute to arbitration, unless expressly authorised in that behalf by the client. If a dispute has been referred to arbitration with the authority of the client, the solicitor would then have implied authority to bind his client in formal matters, such as relating to procedure, *e.g.* extension of time for the making of the award. (*Russel's Arbitration Procedure*, 12th edn., pp. 30-31). The right of a Counsel to bind his client by referring a matter to arbitration is higher than that of an attorney. In litigious matters, he has power to refer a matter in dispute to arbitration. In non-litigious matters (where no litigation has arisen) he has no implied authority. (*Fulchand v. Clarke & Smith*, 36 Bom. L. R. 18.)

### **Matters which can be referred to Arbitration**

Unless prohibited by any Act for the time being in force, or by any law, or by public policy, all matters in controversy which can be submitted to a suit in a civil court can be the subject matter of arbitration under the Act. Even questions of law may be referred to arbitration (21 C. L. J. 273). - A doubtful question of law and fact can be referred. Even a time-barred claim or debt may validly be the subject matter of arbitration. (*Balmukund v. Uttamchand*, A. I. R. 1927 S. 177). Disputes which cannot be decided in a court can also be decided by arbitration *i.e.* question relating to complement or dignity which cannot be decided in a civil court. (*Raghavendra v. Gururao*, 37 Bom. 442.)

### **Matters which cannot be referred to Arbitration**

Matrimonial matters, testamentary matters, cannot be referred to arbitration. For example, the validity of a will cannot be decided by an arbitrator. (*Ghelabhai v. Nandubhai*, 20 Bom. 238). Insolvency proceedings cannot be referred to arbitration. (*Ladha Singh v. Bhan Singh*, 1915, P. R. No. 50, p. 143.)

An arbitrator cannot adjudicate a person insolvent; it is only the Insolvency Court which can adjudicate him insolvent. Questions relating to charities and charitable trusts cannot, without the consent of the Advocate General in the case of the presidency towns, or of the Collector in the case of the mofussil, be referred to arbitration. (*Hasmat v. Siddiq*, A. I. R. 1927, All. 128). Questions relating to minors cannot be referred to arbitration, *e.g.* an arbitrator cannot appoint a guardian for a minor. (30 All. 137). Insanity proceedings cannot be referred to arbitration. An arbitrator cannot declare a person a lunatic; nor can he appoint a guardian for a lunatic. Criminal matters cannot be referred to arbitration. He cannot grant an **injunction**. (1873, 8 Ch. App. 473; nor can he appoint a receiver, 55 Cal. 249.)

**Implied Conditions of Arbitration Agreements [Section 3, and the First Schedule to the Arbitration Act]**

The following are the conditions implied in an arbitration agreement :—

- (1) Unless otherwise expressly provided, the reference shall be to a sole arbitrator.
- (2) If there is an even number of arbitrators to whom the reference is made, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.
- (3) The arbitrators shall make their award within a period of four months after the reference to arbitration is made or within four months after they have been called upon by a written notice to act (the notice having been given by a party to the reference), or within such enlarged period of time as the Court may have allowed or may allow.
- (4) If the arbitrators have not made their award within the time allowed or if they have by written notice informed a party to the arbitration agreement or the umpire that they as arbitrators cannot agree, the umpire shall forthwith enter on the reference in place of the arbitrators.
- (5) The umpire shall make his award within two months after entering on the reference or within such extended time as the Court may allow.
- (6) The award shall be final and binding on the parties and on persons claiming through such parties.
- (7) The arbitrators or the umpire may, in their/his discretion, award the costs of the reference and award, and may direct how and by whom such costs shall be paid, and may tax or settle the amount of such costs and may award costs as between lawyer and client.
- (8) The arbitrators or umpire may, on oath or on solemn affirmation, examine, with regard to the issues in dispute and referred to arbitration, any party to the reference or any person claiming under him; any such party or person shall submit to such examination, and shall produce all books, deeds, papers, accounts and documents in his possession or power, as may be required, and do such other things which, during the hearing of the dispute, the arbitrators or umpire may reasonably require.

[“Umpire” is a person who is to give his decision if the arbitrators disagree. (*Louis Dreyfus & Co. v. Hemandas*, A. I. R. 1940, S. 37).]

## **ARBITRATION WITHOUT COURT’S INTERVENTION**

### **Revocation of Arbitration [Sec. 5]**

Under Sec. 5 of the Arbitration Act of 1940, the authority of an arbitrator or umpire cannot be revoked, except with the leave of the Court, but where the arbitration agreement or reference itself provides that such authority can be revoked without the leave of the Court, it can be so revoked. (*In re Smith Service & Nelson & Sons*, 25 B. D. 545).

Consent of the court to revoke an arbitration can be given on just and sufficient grounds. A good or just and sufficient ground is a ground which is such in the opinion of the Court. The following are the cases in which the Court has granted leave to revoke :—

- (1) Fraud on the part of the arbitrator, *e.g.* collusion or connivance by the arbitrator with one of the parties to the dispute. (*Banshidhar v. Prasad*, 29 All. 13.)
- (2) Unreasonable delay. (*Coley v. De Costa*, 17 Cal. 200.)
- (3) Misconduct of arbitrator, *e.g.* receiving evidence in respect of matters which he has no power to try. (*East & West India Dock Co. v. Kirk & Randall*, 12 A. C. 738) Wrongfully disallowing proper evidence, or accepting evidence which ought not to have been accepted. (1894, 2 Q. B. 915), or concealing the fact of his indebtedness to a party to the dispute.
- (4) Insolvency of a party to the dispute.
- (5) Arbitrator becoming indebted to a party. (*Mahmed v. Hakiman*, 29 Cal. 278).
- (6) By the consent of the parties themselves (8 A. L. J. 66).
- (7) By frustration of contract; or
- (8) By becoming interested in the subject matter. (*Re Baring Bros.*, 61 L. J. Q. B. 704.)

Notice of revocation is complete when it reaches the arbitrator before an award is made and completed by him. (*Coley v. De Costa*, 17 Cal. 200 ; see also 8 Mad. H. C. R. 46.)

### **Provisions in Case of Insolvency [Sec. 7]**

Under section 7, when a person who has entered into a contract with another person, providing for going into arbitration in case of a dispute out of that contract, is an insolvent, the official assignee is bound by the arbitration clause if he at all accepts the contract or

wishes to take advantage of it. If he does not want to abide by the arbitration term of the insolvent's contract he must, as the official assignee, disclaim the contract. Otherwise the receiver is bound by the arbitration clause. [Sec. 7 (1); *Andrews v. Palmer*, 1821, 4 B. & Ald. 250.]

Where a person who has been adjudged insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter under the agreement is to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section 1 of section 7 (*i.e.* what is noted in the preceding paragraph) does not apply, then any other party to the agreement or the receiver may apply to the proper insolvency Court for an order that the matter in question may be referred to arbitration in accordance with the agreement. The Court may then make such order, if it thinks fit to do so.

**This section does not apply to statutory arbitration. (Sec. 46)**

**Power of the Court to appoint Arbitrator or Umpire (Sec. 8)**

The Court can appoint an arbitrator or arbitrators or umpire, under Sec. 8 of the Arbitration Act of 1940, in any of the following cases :—

- (a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment of arbitrator or arbitrators ; or
- (b) if an appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be filled, and the parties or the arbitrators do not fill the vacancy ; or

where the parties or arbitrators are required to appoint an umpire, but do not appoint him ;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or in filling the vacancy.

If the appointment is not made by such concurrence as above said, within fifteen clear days after the service of the notice as above said, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, and such arbitrator/arbitrators or umpire, shall then ha-

### **Power of a party to appoint a new Arbitrator or a Sole Arbitrator** [Sec. 9]

Under Sec. 9 of the Arbitration Act, where an arbitration agreement provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement:—

- (a) if either of the appointed arbitrators refuses or neglects to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place ;
- (b) if one party fails to appoint an arbitrator for fifteen clear days after the service by the other party of a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as the sole arbitrator with the result that his award shall be binding on both parties as if they had concurred in appointing him. But the Court may, if it thinks fit, set aside the appointment of sole arbitrator (so made), and, if sufficient cause is shown to the Court it may either give further time to the defaulting party to appoint an arbitrator or pass such order as it may think fit.

### **Appointment of three or more Arbitrators [Sec. 10]**

Under Section 10 of the Indian Arbitration Act of 1940, where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator.

Where an arbitration agreement provides that the reference shall be to three arbitrators to be appointed otherwise than as mentioned in the preceding paragraph, the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if their award be divided, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.

### **Power of Court to remove Arbitrators or Umpire in certain circumstances [Sec. 11]**

Under Sec. 11, the Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference.

An arbitrator or umpire so dismissed by the Court shall not be entitled to receive any remuneration for his services.

**Power of the Court to fill vacancy [Sec. 12]**

When the Court removes an arbitrator or umpire, it may, on the application of a party, fill the vacancy.

**Powers of Arbitrators and Umpire [Sec. 13]**

Unless otherwise intended by the arbitration agreement, an arbitrator or umpire shall have the following powers :—

- (a) Administering of oath to the parties and witnesses appearing before him ; (if the arbitration is by order of the Court under the Civil Procedure Code, a person giving false evidence can be prosecuted. *Ganti v. Harcourt*, 58 Cal. 215).
- (b) Stating of a special case for the opinion of the Court on any question of law involved ; or stating the award wholly or in part, in the form of a special case of such question for the opinion of the Court;
- (c) Power to make an award conditional or in the alternative ;
- (d) Power to correct in any award any clerical mistake or an error arising out of an accidental slip or omission.
- (e) Power to administer to the parties such interrogatories as may be necessary. (*Kursell v. Timber Operators & Contractors Ltd.*, 1923, 2 K. B. 202.)

Moreover, an arbitrator or umpire can (1) award interest on the amount awarded by him, (2) fix time of payment of the money allowed by his award, (3) award dissolution of partnership and return of premium in whole or in part, (4) draw lots in matters of partition and order execution of documents, and (5) can order costs. (*Sadik v. Imdad*, 3 All. 286.)

**Award must be signed by the Arbitrators and filed in Court [Sec. 14]**

When the arbitrators or umpire have made their award, they must sign it and give notice in writing to the parties that the award has been made and signed, also stating the amount of fees and charges payable in respect of the arbitration and the award. [Sec. 14 (1).]

The arbitrators or umpire must, at the request of any party to the arbitration agreement or of any person claiming under such party, or if so directed by the Court, upon the payment of the fees and charges (in respect of the arbitration and award) of the costs and charges of filing the award, cause the award or a signed copy of it to be filed in Court, and the Court must thereupon give notice to the parties that the award has been filed. [Sec. 14 (2).]

If the arbitrators or umpire refuse to file the award, a party to the arbitration may apply to the Court, within 90 days from the date of the service of the notice regarding the making of the award.

An award signed by the majority of the arbitrators is void, unless the reference allows such signing. (21 C. W. N. 895.)

### **Award an Instrument both of Offence and Defence**

**An award is an instrument both of offence and defence and operates as *res judicata*.**

An award is an instrument of offence in the sense that it can be filed in Court and become a decree of a Court. It is also an instrument of defence in the sense that if a suit is brought on the same cause of action, production of the award and the plea that the award has been made would be a complete bar and defence to the suit. It is *res judicata* in the sense that it acts as a final judgment unless appealed against, within the time limit, on the ground of fraud or misconduct of the arbitrator or a mistake of law apparent on the face of the award or an invalidity of the award or improper procurement of the award.

### **Payment of Fees and Charges of the Arbitrators or Umpire**

The arbitrator or umpire has a lien on the award and he may refuse to file the award until the charges are paid. (Kirkpatrick's case 1897, P. R. No. 22). If his remuneration is fixed beforehand he is entitled to that remuneration; if not so fixed he can charge a reasonable fee. He has no lien over the papers put by the parties in evidence at the hearing before him. (Ponsford v. Swaine, 1861, J. & H. 433.)

### **Power of Court to modify or correct the award [Sec. 15]**

The Court may modify or correct an award—

- (1) when it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision of the matter referred; or
- (2) where the award is imperfect in form, or contains an obvious error which can be amended without affecting the decision of the matter referred; or
- (3) where the award contains a clerical mistake or an error arising from an accidental slip or omission. See also *Kaikobad v. Khambatta*, 11 Lah. 342.

**Power of Court to remit the award for re-consideration [Sec. 16]**

The Court may remit the award or any matter referred to arbitration to the arbitrators or umpire for re-consideration upon such terms as it thinks fit—

- (1) where the award has left undetermined or undecided any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the decision of the matters referred ; or
- (2) where the award is so indefinite as to be incapable of execution ; or
- (3) where an objection to the legality of the award is apparent on the very face of it, *e.g.* when it is incomplete or covers matters not referred. (Davis v. Pratt, 1855, 16 C. D. 586.)

Where an award is so sent back by the Court to the arbitrator or arbitrators, the Court must fix the time within which the arbitrator or umpire shall submit his decision to it, and the time so fixed by it may, by its order, be extended.

If the award so remitted has not been reconsidered, and the decision thereon not submitted to the Court, within the limit of the time fixed by the Court, the award shall become null and void.

**Judgment in Terms of Award**

When the Court finds that there is no cause or ground to remit the award or any of the matters referred to arbitration for re-consideration, or to set aside the award the Court shall, after the time (30 days) for making an application to set aside the award has expired, proceed to give judgment according to the award and a decree shall follow ; no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award (Sec. 17).

**Enforcement of Foreign Awards**

Under the Arbitration Protocol and Convention Act of 1937, (Section 2), "a foreign award means an award on differences relating to matters considered as commercial under the law in force in India made after 28th July 1924 :—

- (a) in pursuance of an agreement for arbitration, and
- (b) between parties of whom one is subject to the jurisdiction of some one of such powers as the Central Government may declare to be parties to the Convention, and



(c) in one of such territories as the Central Government being satisfied that reciprocal provisions have been made may declare to be the territory to which the Convention applies."

By Section 4 of that Act, it is provided that a foreign award is enforceable in this country as if it were an award on a reference made in India.

### **Court can pass Interim Orders [Sec. 18]**

The Court may pass such interim orders as it may think necessary, if it is satisfied that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed on the award.

### **Power of Court to supersede Arbitration [Sec. 19]**

Under section 19, the Court can make an order superseding arbitration in two cases, *viz.*, (1) when an award has become void because the arbitrators did not reconsider it within the time fixed by the Court, after the award was remitted to them by the Court for their reconsideration or (2) when the award is set aside under section 30 of the Arbitration Act, 1940.

## **ARBITRATION WITH COURT'S INTERVENTION WHEN NO SUIT PENDING**

### **Application to the Court for having an Arbitration Agreement entered into between the parties filed in Court [Sec. 20]**

Where any persons have entered into an arbitration agreement before the filing of the suit with respect to the subject matter of the agreement and where a dispute has arisen with regard to the arbitration agreement, or any part of it, the parties or any one of them may apply to the Court for having the agreement filed in Court, and the Court may order the agreement to be filed and refer the dispute to the arbitrator or arbitrators appointed by the parties. Thereafter the arbitration shall proceed according to the provisions of the Act and in accordance with the terms of the arbitration agreement filed in Court.

## **ARBITRATION IN SUITS**

### **Parties to a suit may apply for an order for reference [Secs. 21; 41]**

Where in any suit all the parties agree that any matter in dispute between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply to the Court for an order of reference. [Sec. 21]. The provisions of the Civil Procedure Code apply to all proceedings before the Court and to appeals [Sec. 41].

**Appointment of Arbitrator [Sec. 22]**

The arbitrator shall be appointed in such manner as may be agreed upon between the parties. The order of reference must state the name/names of the arbitrator or arbitrators. The parties (not the Court) will appoint the arbitrator/s.

**Order of Reference [Sec. 23]**

The Court shall by order, refer to the arbitrator the disputed matter which he is required to determine, and must also specify the time within which the award must be made by the arbitrator.

**Reference to arbitration by some only of the parties [Sec. 24]**

Where some only of the parties to a suit apply to have the matters in dispute between them referred to arbitration, the Court may, if it thinks fit, so refer such matters to arbitration (if the same can be separated from the rest of the subject matter of the suit), in the manner provided by law, but the suit shall continue so far as it relates to the parties who have not joined in the said application for arbitration. An award made as the result of such reference shall be binding only on the parties who have joined in the application. (*Jhinu v. Brahmdat*, 57 All. 482.)

**GENERAL****Power of arbitrators to make interim award [Sec. 27]**

Unless a different intention is expressed or appears from the arbitration agreement, the arbitrators or umpire, may, if they think fit, make an interim award.

**Payment of interest on awards [Sec. 29]**

Where an award orders the payment of money, the Court may in the decree, order interest at such rate as it deems reasonable (the interest to be calculated from the date of the decree of the Court confirming the award) on the principal sum as allowed by the award which is confirmed by the decree of the Court.

An arbitrator can award interest on the amount awarded after the date of the reference to arbitration. (*In re Badger*, 1819, 2 B. & A. 691.) But interest cannot be allowed **subsequent to the date** of the award unless authorised by the submission. (*In re Morphet*, 1845, 14 L. J. Q. B. 259.)

**Grounds for setting aside Award [Sec. 30]**

An award shall not be set aside, except on one or more of the following grounds, *viz.* :—

- (a) that an arbitrator or umpire has misconducted himself in the proceedings ;

- (b) that the award has been made after the issue of an order by the Court superseding the arbitration or if the arbitration proceedings have become invalid under Sec. 35 ;
- (c) that an award has been improperly procured or is otherwise invalid.

Moral turpitude, legal or judicial misconduct, amounts to misconduct under section 30. Misconduct may arise even before the reference to arbitration. It may arise in the course of the reference or when the award is being made. And where the arbitrator has failed in his duty, he is guilty of misconduct, if such failure lends to miscarriage of justice. (*Bhogilal v. Chimanlal*, 52 Bom. 116 ; also 30 Cal. 397.)

Asking for an exorbitant remuneration was held to be misconduct on the part of the arbitrator, and his award was set aside on the ground of misconduct. (*In re Prebble and Robinson*, 1892, 2 Q. B. 602.) An award obtained by corruption, bribery or partiality on the part of the arbitrator can be set aside under section 30, on the ground of fraud or misconduct. (*Moseley v. Simpson*, 1873, L. R. 16 Eq. 226.) Merely dining with the arbitrator, in the absence of the other party, or treating the arbitrator without any intention of thereby corrupting or prejudicing him in the favour of the party so treating, does not amount to misconduct. (*Mosely v. Simpson*, L.R. 16 Eq. 226 ; *In re Hooper*, 1867, 36 L. J. Q. B. 97.)

Where an arbitrator has a secret interest, or acquires an interest, in the subject matter of the arbitration, and still acts, without the knowledge of the other party that he is so interested, the award can be set aside on the ground of misconduct. (*Blanchard v. Sun Fire Office*, 1890, 6 T. L. R. 365 ; *Jagrup v. Kashi Prasad*, 1934, A. I. R. All. 658.)

Deciding a matter without hearing what the witnesses have to say, or wrongfully shutting out evidence, without which the case could not be decided, is misconduct on the part of the arbitrator entitling the aggrieved party to have the award set aside. (*The Bombay Co. Ltd. v. National Jute Mills*, 39 Cal. 669.)

If evidence is taken by the arbitrator or arbitrators in the absence of the other party, the award can be set aside on the ground of misconduct. (*Cursetji v. Crowder*, 18 Bom. 299 ; also 7 Lah. L. J. 463.) If the arbitrators act without giving opportunity to the other party to appear at the hearing, then the judgment given by the arbitrator so, *i.e. ex parte*, can be challenged and set aside by the Court on the ground of misconduct of the arbitrator. (*Dreffus v. Pursotom*, 47 Cal. 29 ; *Aboobaker v. Reception Committee*, 39 Bom. L. R. 476.)

An award given by arbitrators in respect of the subject matter at the hearing of which one of the arbitrators was absent, is impeachable on the ground of misconduct, and can be set aside by the Court. (Narain v. Nath, 29 Cal. 36 ; See also Charan v. Nath, 16 A. L. J. 307.)

An award on any matter not referred to the arbitrator can be set aside by the Court, as it is not relevant to the reference. (Suryanarayana, 50 M. L. J. 514.)

Unless the arbitration agreement otherwise allows, the award which must be in writing, must be signed by all the arbitrators, otherwise the award can be set aside. (Narain v. Nath, 29 Cal. 36.) If there is a mistake of law, patent (and not latent), *i.e.*, apparent on the face of the award, the award may be set aside by the Court. (Lekhraj v. Vishindas, A. I. R. 1933 S. 260.) If the award is not complete and clear (is incomplete or vague), it can be set aside by the Court. (Khub Lal v. Bishambur, 22 A. L. J. 919.)

The words "or otherwise invalid" in Sec. 30 mean that an award becomes invalid when (i) the *factum* or the existence of the arbitration agreement is denied (34 Bom. L. R. 697) ; or (ii) where there is a mistake of law quite apparent on the face of the award ; or (iii) when all the arbitrators have not judicially determined the matters in dispute ; or (iv) when the award is too vague to have a definite meaning, or is incomplete and not final ; or (v) when the award is made after the supercession order has been made by the Court ; or (vi) when the award is made after the time prescribed or fixed has lapsed ; or (vii) when the award has been remitted for reconsideration by the arbitrators and they have not sent their award within the time fixed or allowed by the Court for such reconsideration, unless the Court has allowed an extension of the time ; or (viii) when the award decides matters not referred to arbitration, and such matters cannot be separated from the rest without affecting the award ; or (ix) when the appointment of the arbitrator or arbitrators or umpire is not valid, so that the award is made by an incompetent person. (Chotandas v. Radhakissen, 29 Bom. L. R. 1087.)

### **Procedure (How to set aside an Award?)**

An application must be made by a petition under Sec. 30 or by a notice of motion. (Sasoon v. Ramdutt, 50 Cal. 1.)

### **Persons who can move to set aside an Award**

The parties who can apply to set aside the award are : the parties to the reference and their representatives, the executors under the will of the deceased or those who have taken over letters of administration, and the official assignee or receiver. (1840, 2 M. & G. 55.)

### The Period of Limitation for Application to set aside an Award

Both under the Indian Arbitration Act, 1940, and under the Code of Civil Procedure, the period of limitation is thirty days. An application for the setting aside of the award must be made to the Court within 30 days from the date of the service of the notice of the actual filing of the award. (Fourth Schedule—the Indian Arbitration Act, 1940.) The time needed and spent for obtaining a copy of the award, where the arbitrator has not given the copy, is not to be counted in calculating the 30 days. Sec. 12 (4) of the Indian Limitation Act. Under the Code of Civil Procedure also the period of limitation is 30 days from the service of the notice of the filing of the award.

### Duties of Arbitrator/Umpire

An arbitrator or an umpire is in a quasi judicial position. "He is more responsible even than a judge because his award is a final judgment on the rights of the parties before him, and except in exceptional cases, even an appeal does not lie against his order or award." It is for this reason that the arbitrator should be impartial and unbiased. "He must consider himself being in the position of a judge and not that of an advocate or agent of the party appointing him." (See also *Oswald v. Earl of Grey*, 1855, 24 L. J. Q. B. 69.) He should not have any interest in the subject matter of the dispute or in the parties appearing before him. If he has any interest in any of the parties, *e.g.* is indebted to one of the parties, he must disclose the fact of his indebtedness to the other parties before accepting the arbitration. An arbitrator should be impartial and should not hold any communication with one party in the absence of the other. He should regulate the proceedings as in the case of suits. He must appoint the time and place of hearing and must hear both the parties in the presence of each other, except when the other party without any cause absents himself (in which case he can proceed *ex parte*). (*P. Harvey v. Shelton*, 7 Beav. 455.) "Where there are two or more arbitrators, all of them must be present at all the meetings when evidence is being recorded even though the submission may provide for the award being made by the majority of the arbitrators." (*Lord v. Lord*, 1855, 5 E. & B. 404.)

The arbitrators must act strictly within the scope of the submission and decide all matters referred to them without deciding matters which are not referred. They should sign their award. They should not delegate their powers and duties to any one (*delegatus non potest delegare*). They are judges of both fact and law. (*Nanjappa v. Nanjappa*, 23 M. L. J. 290.)

An umpire enters upon the reference only when the arbitrators disagree and give notice to the umpire. The umpire must hear the whole case *de novo* and decide the whole case and not merely the

matters in respect of which the arbitrators disagreed; but the parties may consent that the umpire should decide on the arbitrators' notes of evidence. (*In re Jenkins*, 1841, 11 L. J. Q. B. 71).

In a commercial arbitration, an arbitrator who acted as such in a matter may give evidence before the umpire hearing the same matter. (*Bourgeois v. Weddell & Co.*, 1924, 1 K. B. 539). So the umpire should take his evidence for whatever it may be worth. (*Brajendrakumar v. Purna Chandra*, 58 Cal. 269.) But the arbitrator cannot be compelled to give evidence.

### **Arbitrators' Remuneration and Costs (Sec. 38)**

Where the remuneration payable to arbitrator has been fixed beforehand by the arbitration agreement or reference, he shall be entitled to have the same. Usually, at the first meeting before the arbitrators or at the time of appointment of arbitrators, the remuneration payable to arbitrators is settled with the parties. If the fees payable to arbitrators be not determined or fixed beforehand, that is to say, at the time of the appointment or first hearing, the arbitrators can charge any reasonable fee; even if they demand excessive remuneration before delivering the award, the parties have no remedy except that of applying for setting aside the award on the ground of misconduct or accepting the decision of the Court by depositing the amount of fees claimed by the arbitrators, in which case the Court would order the delivery of the award by the arbitrator.

### **Disabilities of Arbitrator or Umpire**

- (1) He cannot alter the submission.
- (2) He cannot decide whether the submission itself is valid or not but can decide whether the submission was obtained by fraud or not. (*Mahmed v. Pirojshaw*, 34 Bom. L. R. 697.)
- (3) He cannot determine insolvency, matrimonial, criminal or testamentary matters and cannot decide on a matter relating to a public or charitable trust except with the permission of the Advocate General in the case of presidency towns or the Collector in the case of the districts. Matters relating to minority and lunacy cannot be decided by arbitration. He cannot appoint a receiver or grant an injunction, but may recommend the same. (*Willesford v. Watson*, 1873, 8 Ch. App. 473; *Surendra v. Sushil Kumar*, 55 Cal. 249).

### **Provisions of the Act binding on the Crown**

The provisions of the Indian Arbitration Act, 1940, are binding on the Crown.

### Statutory Arbitration

There are arbitration proceedings under other Acts also. To such statutory arbitration, *i.e.*, arbitration under some Act other than the Arbitration Act, 1940, the Arbitration Act, 1940, shall, except Sec. 6 (1) and Sections 7, 12 and 37, apply as if the statutory arbitration were an arbitration under the Arbitration Act, 1940, subject, however, to any conflicting provisions in the other Act. If the provisions of this Act differ from those of the other Act, then the provisions, to that effect, of that other Act would override those of this Act. This Act, so far as its sections 6 (1), 7, 12 and 37, are concerned, does not apply to a statutory arbitration.

A statutory arbitration means an arbitration under the provisions of an Act other than the Arbitration Act, 1940.

Under the Arbitration Act, 1940, arbitration is voluntary, and not compulsory. Parties may resort to it if they so desire to do. But arbitration may be made compulsory under the provisions of a statute, and, in that case, parties have to resort to it; that is compulsory arbitration, *e.g.* in the case settlement of disputes between capital and labour.

## FORMS

## [Application under section 20 of the Arbitration Act, 1940.]

Suit No. \_\_\_\_\_ of 19 \_\_\_\_\_  
**IN THE HIGH COURT OF JUDICATURE AT** .....  
 Ordinary Original Civil Jurisdiction.  
 In the Matter of the Arbitration Act,  
 1940.  
 and  
 In the Matter of an Arbitration Agreement  
 dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_  
 Between  
 A. B. (name, description and place of  
 residence)  
 Plaintiff,  
 and  
 C. D. (name, description and place of  
 residence)  
 Defendant.

The petition of A. B. abovenamed sheweth :—

1. By an agreement in writing dated the \_\_\_\_\_ day of 19 \_\_\_\_\_ and  
 entered into by and between the plaintiff and the defendant abovenamed at  
 (place where the agreement was entered into and signed) \_\_\_\_\_ within the  
 aforesaid jurisdiction, copy whereof is hereto annexed, it was agreed that the following  
 matters in difference between the parties should be referred to the arbitration of  
 (name, description and place of residence of the arbitrator)  
 (state matters of difference)

2. Difference has arisen between the plaintiff and the defendant as to  
 (state the nature of the difference) to which the said agreement applies.

Your petitioner, therefore, prays for an  
 order that the said agreement be filed.

A. B.

Plaintiff's Attorney.

I, \_\_\_\_\_ of \_\_\_\_\_ make oath (solemnly affirm)  
 and say that the matters referred to in paragraphs to \_\_\_\_\_ or of the  
 foregoing petition are true to my knowledge.  
 Sworn (solemnly affirmed)  
 etc.

A. B.

## [Notice under section 20 (3) of the Arbitration Act, 1940.]

Suit No. \_\_\_\_\_ of 19 \_\_\_\_\_  
**IN THE HIGH COURT OF JUDICATURE AT** .....  
 Ordinary Original Civil Jurisdiction.  
 (Title)

To

C. D.  
 the defendant abovenamed.

Whereas the plaintiff abovenamed has on the \_\_\_\_\_ day of 19 \_\_\_\_\_ made  
 an application which has been numbered and registered as Suit No. \_\_\_\_\_  
 of 19 \_\_\_\_\_ for an order that the arbitration agreement dated the \_\_\_\_\_ day  
 of \_\_\_\_\_ 19 \_\_\_\_\_ and entered into by and between the plaintiff and you the  
 defendant be filed, you are hereby required under sub-section (3) of section 20 of the  
 Arbitration Act, 1940, being served with this notice, to appear before the Court on  
 the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ at \_\_\_\_\_ O'clock  
 in the forenoon to show cause why the said agreement should not be filed.

Dated \_\_\_\_\_

19 \_\_\_\_

Registrar

Master



[Application for an order of reference under section 21 of the Arbitration Act, 1940.]

Suit No. \_\_\_\_\_ of 19 \_\_\_\_  
**IN THE HIGH COURT OF JUDICATURE AT.....**  
 Ordinary Original Civil Jurisdiction.

In the Matter of the Arbitration Act, 1940  
 and  
 In the Matter of Suit No \_\_\_\_\_ of 19 \_\_\_\_  
 A. B.  
 v.  
 C. D.

(Title of Suit)

The petition of A. B. and C. D. abovenamed sheweth :—

1. This suit is instituted for (state nature of claim).
2. The matters in difference between the parties are (state matters of difference).
3. The petitioners being all the parties interested have on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ at \_\_\_\_\_ within the jurisdiction aforesaid agreed (state nature of agreement) that the matters in difference between them shall be referred to the arbitration of (name, description and place of residence of the arbitrator or the manner as to the appointment of arbitrator agreed upon between the parties).
4. The petitioners therefore pray :—
  - (a) that the aforesaid matters in difference be referred for determination to the arbitrator abovenamed ;
  - (b) that the date within which the award is to be made be fixed.

A. B.  
 C. D.

(Verification as in Form No. 1.)

[Section 13 (b) of the Arbitration Act, 1940.]

(Special Case)

**IN THE HIGH COURT OF JUDICATURE AT.....**  
 Ordinary Original Civil Jurisdiction.

In the Matter of the Arbitration Act, 1940  
 and  
 In the Matter of an Arbitration Agreement  
 dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_  
 Between  
 A. B. (name, description and place of residence)  
 and  
 C. D. (name, description and place of residence)  
 or  
 In the Matter of Suit No \_\_\_\_\_ of 19 \_\_\_\_

(Title of Suit).

The following special case is stated for the opinion of the Court :—

(state the facts concisely in numbered paragraphs.)

The questions of law for the opinion of the Court are :—

First, whether

Secondly, whether

X  
 Y

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_

Arbitrators  
Umpire.

**[Notice under section 14 (3) of the Arbitration Act, 1940.]**

IN THE HIGH COURT OF JUDICATURE AT.....  
 Ordinary Original Civil Jurisdiction.  
 (Title)

Take notice that the Arbitrators have  
Umpire has stated for the opinion of the Court a  
 special case, copy whereof is hereto annexed, and that the Court will proceed to pro-  
 nounce its opinion thereon on the day of 19 .  
 Dated this day of 19 .

Registrar.

**[Notice under section 14 (2) of the Arbitration Act, 1940.]**

IN THE HIGH COURT OF JUDICATURE AT.....  
 Ordinary Original Civil Jurisdiction.  
 (Title)

Take notice that the Award of the Arbitrator appointed in the matter of the  
 above Agreement  
Suit has this day been filed and that the Court will proceed to pro-  
 nounce judgment on such Award on the day of 19 .  
 Dated this day of 19 .

Registrar.

**[Order of Reference under sections 20 (4) and 23 (1) of the Arbitration Act, 1940.]**

IN THE HIGH COURT OF JUDICATURE AT.....  
 Ordinary Original Civil Jurisdiction.

In the Matter of the Arbitration Act, 1940  
 and

In the Matter of an Arbitration Agreement  
 dated the day of 19 .

Between

A. B. (state name, description and place  
 of residence)

and

C. D. (state name, description and place  
 of residence)

or

In the Matter of Suit No. of 19 .

(Title of Suit)

Upon reading the petition of verified by an  
 affidavit of affirmed on the day of 19 and  
 filed on the day of 19 and a notice dated the  
 day of 19 , issued upon the filing of the said petition and  
 an affidavit of of the due service thereof affirmed on the day of  
 19 , both filed on the day of 19 and the Arbi-  
 tration Agreement dated the day of 19 entered into by and bet-  
 ween the plaintiff and the defendant and upon hearing counsel for the plaintiff  
 and counsel for the defendant it is ordered that the said agreement  
 be filed And it is further ordered that the following matters in difference  
arising in this suit namely,  
specified in the said agreement  
 (state the matters in difference)

be referred for  
 determination to X and Y, or in case of difference of opinion between them to the  
 determination of Z, who is hereby appointed to be Umpire And it is further ordered  
 that the said arbitrators shall make and submit their award in writing together with

all proceedings had, depositions recorded and exhibits filed before them on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, and in case of difference of opinion between the said arbitrators as to the award they shall forthwith give notice of such difference to the said Umpire who shall make and submit his award in writing together with all proceedings had, depositions recorded and exhibits filed before him within the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_. And the parties are to be at liberty to apply from time to time as they may have occasion.

Witness, etc.

Registrar  
Master

**[Order for appointment of new Arbitrator or Umpire under sections 8 (2) and 12 of the Arbitration Act, 1940.]**

Upon reading on the part of (name of petitioner) a notice dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ from \_\_\_\_\_ his attorney or from the said petitioner to \_\_\_\_\_ the respondent abovenamed and \_\_\_\_\_ his attorney and an affidavit of \_\_\_\_\_ of the due service thereof affirmed on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ and an affidavit of \_\_\_\_\_ affirmed on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ all filed on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_. And upon hearing \_\_\_\_\_ counsel for the petitioner and \_\_\_\_\_ counsel for the respondent : And whereas by an Arbitration Agreement dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ of \_\_\_\_\_ (state terms of the agreement or order of reference relating to the matter and failure to appoint or death, refusal, etc., of arbitrator or umpire). It is ordered that Z be appointed in the place of X deceased (or as the case may be) to act as arbitrator with Y, the surviving arbitrators under the said Agreement or Z be appointed to act as Umpire And it is further ordered that the award of the said Arbitrators Umpire be made and submitted in writing on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Witness etc.

Registrar  
Master

**Form of Award**

(Title)  
Whereas in pursuance of an agreement in writing, dated \_\_\_\_\_ the \_\_\_\_\_ order of reference made herein on \_\_\_\_\_ and made \_\_\_\_\_ between the above-named A. B. and C. D., the following matters in difference between the said A. B. and C. D. have referred to me X. Y. the \_\_\_\_\_ namely, \_\_\_\_\_ matters in difference between them concerning :

(state matters in difference)

/have been referred to me for determination/

Now, I, the said X. Y., having duly considered the matters submitted to me, do hereby make my award as follows :—

I award—

(1) that

(2) that

(Signed) X. Y.  
Arbitrator.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

## CHAPTER XXVII

### LAW OF MORTGAGES

#### What is a Mortgage ?

Fisher defines a mortgage as a "security upon property for the performance of an engagement". There is somebody to transfer the interest, and somebody to receive, at least temporarily, the transfer or possession of the property or some title deeds to the property, if not the property.

Under Sec. 58 (a) of the Transfer of Property Act, a mortgage is defined as a "transfer of an interest in specific immovable property, for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability." (See also *Vasudev v. Bhau*, 21 Bom. 528.)

#### Implications of a Mortgage

A mortgage involves the transfer of the interest of the owner of some property in that property to another person as a protection to him for the fulfilment of an obligation. If the obligation is not satisfied, the other party, i.e. the person to whom the interest in the property is transferred, can have recourse against the property for the fulfilment of his claim against the creator of the mortgage. The person transferring the interest is called the 'mortgagor'; and the person to whom the interest is so transferred is called the 'mortgagee'. The transaction itself is called a 'mortgage' or a 'mortgage transaction'.

### MORTGAGE DISTINGUISHED FROM ANALOGOUS TRANSACTIONS

#### What is a Charge ?

#### Mortgage and Charge Distinguished

In a charge a right to satisfy the amount of the debt out of some property, i.e., the property charged, is created. In a mortgage, there is a transfer of interest in the property, and, therefore, a transferee of the property after the creation of the mortgage, does not get free from the mortgage (which prevails and holds good against such transferee), even if he took the property without any knowledge of the mortgage. But the subsequent transferee of property merely charged (and not mortgaged) does get free from the charge, if he took without any knowledge of the existence of the charge; but if he took with such notice or if he took it as a mere volunteer (without consideration), then he does not get the property free from the charge. (*Kisonlal v. Gangaram*, 13 All. 25.)

[Section 100 of the Transfer of Property Act defines a charge thus: "Where an immovable property of one person is, by an act of the parties or by operation of the Law, made security for payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."]

A mortgage is for a debt; but a charge does not necessarily signify or imply a debt.

A charge may be created in perpetuity; but a mortgage is for a stipulated period.

Whereas a charge does not require the formality of attestation by two witnesses, a mortgage does require attestation by two witnesses.

#### "Mortgage" distinguished from "A Covenant not to Alienate"

A mortgage necessarily involves a transfer of interest in specific property; but a covenant against alienation of property does not involve a transfer of interest. It is a mere covenant by which the person undertakes not to alienate the property and not a mortgage. (*Najimulla v. Nasir*, 7 Cal. 196.)

**“Mortgage” distinguished from “Sale with the obligation of the Buyer to retransfer”**

In a mortgage there is a **security for a debt**. But in a “sale with the obligation of the buyer to reconvey” the property, there is not **any relation of debtor and creditor**; and the seller has **transferred away all the rights** of his in the property to the buyer, **subject only to the condition** that the buyer may have to reconvey to the seller who has the qualified right of repurchase. The real nature of the transaction depends upon the intention of the parties. (Bapuji v. Sanavaraji, 1878, 2 Bom. 231; Abdul Latif v. Gani, 1939, A. C. 730; Kasturchand v. Jakhia, 1916, 40 Bom. 74.)

**Effect of Agreement to Mortgage**

In England, according to the law there, an agreement to create a mortgage amounts to an equitable mortgage. But according to **our law in India**, an agreement to mortgage property is a **bare agreement to mortgage**, and **does not amount to an equitable mortgage**. (Maneklal v. Saraspur Manufacturing Co., 29 Bom. L. R. 253.) There is only a personal obligation (Hukumchand v. Radha Kishan, 1930, 34 Cal. W. N. 506), for which specific performance is not allowed. (Western Waggon & Property Co. v. West, 1892, 1 Ch. 281.) The remedy in case of breach of the agreement is damages. (Jaidayal v. Sahi, 1890, 17 Cal. 432; Datubhai v. Abubaker, 12 Bom. 242.)

**Requisites of Valid Mortgage**

No particular form of words is required in the mortgage deed. But **there must be a definite and sufficient intention clearly expressed and communicated** that the debtor gives a security. **Mutuality of remedies of the mortgagor and mortgagee is an essential** of a mortgage. (Howard v. Harris, 2 W. & T. Leading Cases 11.) The right created by the transfer of interest is accessory to the right to recover the debt. (Chetti Gaundan v. Pillai, 1864, 2 Mad. H. C. 51, 54.)

**Excepting an equitable mortgage**, the mortgage can be effected by a **registered deed signed by the mortgagor and attested by at least two witnesses if the sum secured is one hundred rupees or more**. But if the amount secured is less than Rs. 100, the mortgage can be effected by a **registered deed attested by at least two witnesses, or by a delivery of possession (unless the mortgage is a simple mortgage)**.

If the deed is not attested, there can be neither a mortgage, nor a charge. (Patter v. Samad, 31 Mad. 337.) But an invalidly attested deed can be brought in **evidence of the personal covenant to pay**. (Pulaka v. Thiruthipali, 32 Mad. 410; Vani v. Bani, 20 Bom. 553). Till it is registered, a mortgage cannot be regarded as complete; and it does take effect only from the date of its execution. “The real meaning of the parties which the transaction discloses is more important than the form of expression. (Parsand v. Babooee, 1856, 6 M. I. A. 393, 411.)

**WHAT CAN BE MORTGAGED ?****Can movables be mortgaged or hypothecated ?**

According to the Transfer of Property Act, **interest in specific immovable property alone can be mortgaged**; mere personal rights cannot be mortgaged.

Under the Transfer of Property Act, there is no provision regarding mortgage of movable property. The term “mortgage” is, strictly speaking, applied with reference to immovable property. But broadly speaking, a mortgage can be effected of movable property also. It can be made even of future property, or property not yet in existence. It is, in such a case, an agreement to mortgage future movable property. (Misrilal v. Mazhar, 13 Cal. 262). But in such a case, i.e., where the mortgagee has not the possession of the mortgaged property, a subsequent transfer with possession of the property gives the transferee a stronger title so as to defeat the title of the mortgagee without possession, provided the subsequent transferee took the transfer **without notice** of the previous title. (Co-operative Hindustan Bank v. Surendra, 36 Cal. W. N. 263.)

Mortgages of movables can be made by mere parol ; a writing is not obligatory. (*Teilram v. D'Mello*, 18 Bom. L. R. 587.) The mortgagor transfers the property in the goods (from the transferor) to the transferee, from the time of the loan, advance or the payment of the price. (*Tehilram v. D'Mellow*, 18 Bom. L. R. 587).

Personal estates, choses in action, hereditaments, contingent, expectant or vested estates, can also be mortgaged. But the separate estate of a married woman without power of anticipation, charity estates, profits of an ecclesiastical benefice, cannot be mortgaged. Calls on shares can be mortgaged, under the Companies Act.

### **“Mortgage” and “Hypothecation”**

We have considered the implications of the term “mortgage.” Now what is “hypothecation?” **Hypothecation involves a transaction in which money is lent, with the condition of repayment against the property,**

- (1) Mortgage may be of immovables or movables ; hypothecation is of movables.
- (2) In a mortgage there is an assignment of interest in specific property. But in hypothecation there is not an assignment of interest, but only the obligation to repay the money against the specific property.

### **Who can be a Mortgagee?**

Any person who can hold property, and be transferee of property or of an interest in property, can be a mortgagee, though he may otherwise be incompetent, under the Contract Act to contract. **So even a minor can be a mortgagee.** (*Chariar v. Shrinivasa*, 40 Mad. 308 ; *Thakur v. Putli*, 5 Lah. 317.)

### **Mortgage Money**

Under Sec. 58 (a), mortgage money means the principal money and interest thereon, for the repayment of which, the security is given.

### **Distinction between Mortgage and Pledge**

In a pledge, there is a **transfer of possession of the goods** from the owner to the pledgee. In a mortgage of movables—hypothecation—there is no delivery, to the hypothecatee. Pledge can only be of **goods** ; but mortgage may be of **movables as also immovables.**

## **DIFFERENT KINDS OF MORTGAGES**

The following are the different types of mortgages:—

- (1) Simple Mortgage ;
- (2) Mortgage by way of Conditional Sale;
- (3) Usufructuary Mortgage ;
- (4) English Mortgage ;
- (5) Mortgage by deposit of title deeds ;
- (6) Equitable Mortgage ;
- and (7) Anomalous Mortgage.

### **Simple Mortgage [Sec. 58 (b) Transfer of Property Act]**

A simple mortgage is a mortgage in which the borrower, *i.e.*, the mortgagor, **does not convey the mortgaged property** to the lender (mortgagee) **but**, while retaining the possession with himself, **gives a covenant to be personally liable to pay the borrowed money back, with interest** thereon at the agreed rate ; and, in case of his failure to do so, the mortgagee would be entitled to have the property sold away, by a decree of the Court, in a suit, and to get paid out of the sale proceeds the amount due to him as principal and interest. The mortgagee, in such a case, is called a **simple mortgagee**. If the simple mortgagee does not want to sue for a decree for sale of the property, he can sue the mortgagor for a decree for the recovery of the amount lent by him, together with the interest thereon, and the costs of the suit. But he cannot get any payment out of the rents and fruits of the mortgaged property ; nor can he sue for foreclosure, *i.e.*, to get the property permanently in his own legal right.

**Mortgage by way of Conditional Sale [Sec. 58 (c) of Transfer of Property Act]**

A mortgage by way of conditional sale of property is a mortgage in which there is an **ostensible sale** of the mortgagor's property to the lender (mortgagee) in consideration of the loan by the mortgagee to the mortgagor. The property is conveyed to the lender. Upon the repayment of the mortgage money, the mortgagor is entitled to a reconveyance of the property. If the mortgage money is not repaid at the agreed date, the sale will become absolute upon the mortgagee applying to the Court, and getting a decree in his favour, because the right to redeem is then lost. The condition—that on default of payment the sale shall become absolute, or that on repayment the sale shall become void; or that the buyer shall retransfer the property to the seller on repayment of the mortgage money—**must be embodied in the mortgage deed.**

The mortgage by conditional sale is known in Bombay as **Gahan Lahan mortgage**; in Bengal it is called **Bai-bil-Wafa or Kut-kubala** or “**conditional bill of sale.**” In Madras it is known as **Mudatakriyan**. In Bombay, the Gahan Lahan mortgage is redeemable though the date of repayment has passed, because the principle “**Once a mortgage, always a mortgage**” has been applied to the transaction. (*Bapuji v. Senavarji*, 2 Bom. 231.)

Under section 67 of the Transfer of Property Act, a mortgagee by conditional sale **can sue for foreclosure, but not for sale of the mortgaged property.** By foreclosure the conditional sale becomes **absolute.**

A mortgage by conditional sale must be distinguished from ‘a sale with a right of repurchase.’

Both transactions are similar, but there is difference between the two. Whereas a mortgage by conditional sale is only an **ostensible sale**, a sale with a right of repurchase is an **out-and-out sale**. To determine whether a transaction is a mortgage or a sale with right to repurchase we have to turn to the **intention of the parties.** The Court will not be guided by the mere form of the transaction but by the **true intention** of the parties to the transaction.

Unless there is a **debt**, the transaction is not a mortgage. (*Alderson v. White*, 2 D. & J. 97.) If the transaction amounts to a mortgage by conditional sale, it must be really such, and not merely in such form; moreover the whole mortgage transaction should be effected through **one document only.** Moreover in a mortgage the mortgagor **can redeem the property though the date at which the mortgage money was to be repaid has passed**; but in a sale with a right of repurchase the right to have the repurchase is lost, once the time of repayment has passed.

**Usufructuary Mortgage [Sec. 58 (d), Transfer of Property Act]**

A usufructuary mortgage is one in which the mortgagor delivers or agrees to deliver possession of the mortgaged property to the mortgagee, and allows it to remain with the mortgagee, till the mortgagor repays the mortgage money; it is of the essence of such mortgage, as its very name suggests, that **the rents, fruits and yields of the property go to the mortgagee as and by way of interest on the mortgage sum or in lieu of such interest and/or the repayment or partial repayment of or towards the principal sum.** The mortgagee, in such a case, is called a usufructuary mortgagee.

In the absence of a personal covenant for payment of the mortgage money, the usufructuary mortgagee cannot sue the mortgagor for payment of the mortgage money; nor can he sue for the sale or foreclosure of the mortgaged property. His remedy is that of remaining in possession, as usufructuary mortgagee, till the amount payable to him gets fully paid out of the rents, profits or yields of the property.

What are known as “**zarpeshgi**” leases can be differentiated from usufructuary mortgages. Unless really intended as security for the debt [in which case these are mortgages (23 I. A. 158)], these leases are in the nature of debts or loans for a premium—leases granted on a sum advanced. The lessor is given the power of redemption.

### **Madarawara Mortgages**

These are mortgages (prevailing in Kanara) in which the mortgagee is in possession of the property and takes the rents and profits of the property instead of interest. The mortgagor has a right to redeem. Foreclosure is not allowed.

### **Otti Mortgages**

These are mortgages in which redemption cannot take place unless twelve years have lapsed since execution, unless there is an agreement to the contrary. (*Shekhara v. Rau*, 1879, 2 Mad. 193.)

### **English Mortgage [Sec. 58 (e) Transfer of Property Act]**

When the mortgage debt has been agreed to be satisfied, at a specified date, and the mortgage property is transferred absolutely to the mortgagee, subject to the condition that the property shall be reconveyed to the mortgagor upon the repayment of the mortgage money, the mortgage is called an English mortgage. The mortgagee can sue the mortgagor for the recovery of the mortgage money. The English mortgagee cannot sue for foreclosure but can sue for a decree for sale.

An English mortgage differs from a mortgage by conditional sale, in that (1) whereas in an English mortgage the money has to be repaid by a specified date, there is no such stipulation in a mortgage by conditional sale, and (2) while in an English mortgage the mortgagee can enter into possession of the mortgaged property upon the execution of the mortgage deed, in a mortgage by conditional sale it is not necessarily so. (*Shrinath v. Khetar*, 16 Cal. 693.)

### **Mortgage by Deposit of Title-Deeds [Sec. 58 (f), Transfer of Property Act]**

It is a mortgage in which the mortgagor delivers to the mortgagee or to his agent documents of title to immovable property which is mortgaged by him. It is a mortgage by a simple deposit of title deeds, without any transfer of the property. But the intention must be that of creating a mortgage of the property, the title deeds of which are deposited with the lender or his agent. Such a mortgage can be created in the towns of Calcutta, Bombay, Madras, and any other town so specified by the Provincial Government.

A mortgage by deposit of title deeds is a kind of equitable mortgage.

A mortgage by deposit of title deeds does not require any writing or registration, unless the parties have prepared a mortgage contract (in which case it must be registered—*Vernon v. Barcel*, 1 Eden. 113.)

An equitable mortgagee cannot sue for foreclosure, though he can sue for a decree for sale. A suit for the mortgage money can only be brought if there is a personal covenant to repay.

### **Equitable Mortgage**

An equitable mortgage is one which is implied from the nature of the transaction. An equitable mortgage may arise (1) by deposit of title deeds; or (2) by a mortgage of the equity of redemption of mortgage; or (3) in English law only (but not in India) by an agreement to create a mortgage. In Indian Law, an agreement to create a mortgage creates neither a mortgage nor a charge, but only a personal obligation.

### **Anomalous Mortgage [Sec. 58 (g), Transfer of Property Act]**

An anomalous mortgage is a mortgage which is other than a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage, a mortgage by deposit of title deeds or an equitable mortgage.

### **Stock Mortgage**

It is a mortgage for which the lender has not paid the loan amount in cash, but in securities—by transfer at market value at date of delivery, with an arrangement that the borrower shall return the mortgage money in the form of similar securities.



### Legal Mortgage

**It is a mortgage other than an equitable mortgage.**

#### Sub-Mortgage or Derivative Mortgage

When the mortgagee mortgages a portion of the property (secured in his favour) to some other person or persons, such mortgage by the mortgagee is called a sub-mortgage. (*Muthu v. Chetty*, 1897, 20 Mad. 35.)

#### Covenants in Mortgages

Such covenants as the parties to the mortgage think fit, looking to the usages where the mortgage is executed, may be included as **express covenants**.

Under section 65 of the Transfer of Property Act, the following are, in the absence of a contract to the contrary, **implied covenants** :—

(1) That the mortgagor **does really possess the interest** which he transfers to the mortgagee, and **that he has the right to transfer** the same.

(2) That the mortgagor **will protect and defend** his title to the property, and, where the mortgagee is in possession of the mortgage property the mortgagor will enable him to defend the mortgagee's title.

(3) That the mortgagor will, if and as long as the mortgagee is not in possession of the property, **pay all public charges in respect of the property** ; but this does not imply that all public charges before the commencement of the mortgage have been paid. If the mortgagor transfers the equity of redemption (*i.e.*, the advantage allowed him to redeem the property) to a third party, then this implied covenant does not continue. (*Balkrishna v. Vishvanath*, 19 Bom. 528.)

(4) That if the mortgage is a second or subsequent mortgage, the mortgagor **will pay the interest on each of the prior mortgages** punctually and regularly, and **will at the proper time pay the amounts due on such prior mortgages**.

(5) That if the mortgaged property is a lease, the **rent payable by the mortgagor must have been duly paid till the date of the commencement of the mortgage**. As long as the mortgage lasts and the mortgagee is not in possession of the mortgaged property, the mortgagor **shall pay the rent under the lease, and if the list gets renewed he shall perform the conditions of the same**. He shall abide by all the conditions and observe the contracts by which the lessee is bound, and shall **indemnify the mortgagee** against all claims by reason of non-payment of the rents or non-observance of the conditions or contracts.

#### Priority of Mortgages [Secs. 48 and 79 of Transfer of Property Act]

Under section 48 of the Transfer of Property Act, each right created by mortgage of the property concerned shall, subject to a contract or express stipulation or reservation to the contrary, rank in the order of time in which it is created, so far as **legal mortgages are concerned**. On the other hand, an equitable mortgage, *e.g.*, by deposit of title deeds, or transfer in blank of shares in a Company, can be defeated by a legal mortgage of even a later date.

Even in the case of legal mortgages, a subsequent legal mortgage can have priority of a mortgage of a prior date, if it is proved that **the prior legal mortgagee allowed the subsequent legal mortgage to be made through his fraud, misrepresentation or gross negligence**. (*Radcliffe's case*, 6 Ch. A. C. 852 ; *Oliver v. Henton*, 1899, 2 Ch. 455.)

Under section 79 of the Transfer of Property Act, if a mortgage to secure further advances, the performance of an engagement or the balance of a running account, expresses the maximum amount which is to be secured thereby, a subsequent mortgage of the same property shall, **if made with the knowledge of the prior mortgage**, be postponed to the prior mortgage in respect of all advances and debts not exceeding the maximum amount **though made or allowed**

with notice of the subsequent mortgage. In England, on the other hand the rule in *Hopkinson v. Rolt*, 9 H. L. 540, applies, under which the first mortgagee who made a further advance, with knowledge of subsequent mortgage, will not have priority (over the subsequent mortgagee) in respect of such further advances. In India this rule does not apply ; but Sec. 79 (given already) applies, so as to give priority to the first mortgagee.

As regards equitable mortgages *inter se*, the rule is that the prior in time is the stronger in legal right (*qui prior est tempore potior est jure*), unless there is gross negligence on the part of the prior equitable mortgagee, e.g., allowing the title deeds to be taken back or kept by the mortgagor. In the case of gross negligence of the mortgagee, if the mortgagor creates another mortgage—even equitable—the second equitable mortgagee will have priority over the first or earlier mortgagee. (*Ferrant v. Yorkshire Bank*, 43 Ch. D. 182).

As between a legal mortgagee and an equitable mortgagee, the legal mortgagee even of a subsequent date will have priority over a prior equitable mortgagee, provided the legal mortgagee took the mortgage without knowledge of the prior equitable mortgage ; but if he took it with knowledge of the prior equitable mortgage, the legal mortgagee can have no such priority. Notice of the prior equitable mortgage may even be constructive, e.g., where the legal mortgagee is bound by such notice by reason of his failure to make proper inquiries as to the title deeds of the mortgage property (*Hewitt v. Lossemore*, 9 Hare, 466).

#### Rights of Mortgagors

The following are the rights of mortgagors :—

- (1) **The right to redeem** at any time after the principal money has become due on the mortgage, if the right has not been put an end to by a decree of the Court or by act of the parties. The maxim is : **Once a mortgage, always a mortgage**. That means that the mortgage is only a mortgage ; and it is one of the rights of the mortgagor to pay back the mortgage money and free the property from the mortgage. (*Nokes v. Rice*, 1902, A. C. 24).

Since the mortgagor is allowed by the Court to pay back the mortgage money even after the time for payment has passed, the right of the mortgagor to redeem the property is called the **equity of redemption**.

The right of redemption cannot be taken away, restricted or fettered up by any condition or provision to that effect ; any such stipulation will be regarded as void, for there can be no clog on the 'equity of redemption'—the 'right of redemption'. A stipulation whereby, for failure to repay the mortgage amount at the due date, the right of redemption has to be postponed for a particular period of time, is void. (*Sherkhan v. Dayal*, 49 I. A. 60).

- (2) **He has the right to accessions**. If there is any accession to the mortgaged property, during the term and continuance of the mortgage, while the mortgagee is in possession, the accession shall, upon redemption by the mortgagor, go to the mortgagor, and not to the mortgagee. But if the accession was acquired at the expense of the mortgagee, the mortgagee can claim such expenditure from the mortgagor if the latter wants the accession which is capable of being enjoyed separately from the mortgaged property. But if the accession is such that it cannot be enjoyed separately from the property, the accession must be given up with the property, unless the accession was made for preservation of the property from loss, sale or forfeiture, or was made with consent, in which case the mortgagor will have to pay for the expenditure.
- (3) **Right to improvement executed on the mortgaged property**. If, while the mortgagee is in possession of the mortgaged property, he makes improvements on the property, with his own money, the mortgagor,

and not the mortgagee, shall be entitled to the improvement /s. upon redemption by the mortgagor, unless such improvement was necessary for the very preservation of the property or unless it was made in consequence of a lawful order by a lawful authority or public servant. (Sect. 63A of the Transfer of Property Act.)

- (4) **The right to inspection and copies of documents.** The mortgagor can, at his own cost, have inspection and copies of documents relating to the property, in charge of the mortgagee, as long as the right of redemption is not lost.
- (5) **The right to deposit in Court the mortgage money.** The mortgagor, or any person entitled to institute a redemption suit, can at any time after the mortgage money has become due payable and before the suit for redemption becomes barred, deposit in Court the mortgage amount towards the account of the mortgagee. The Court will then give notice (of the deposit) to the mortgagee who can go to the Court and take the money from there ; if he takes the money, he will be deemed to have taken it in full satisfaction of his claim, *i.e.* the mortgage amount. If the deposit was of the proper amount, then the mortgagee **cannot claim any interest after the date of the service of notice on the mortgagee** that the amount can be taken from the Court where it is deposited. The mortgagee must give up in Court all the documents re : the mortgage.

#### **Partial Redemption [Secs. 60 and 67 of the Transfer of Property Act.]**

Under section 60 of the Transfer of Property Act, a person interested in a share **only** of the mortgaged property **cannot redeem his own share only** of the mortgaged property on payment of a proportionate part of the amount remaining due on the mortgage, **except when** the mortgagee, has, or, if there are more mortgagees than one, then all such mortgagees have **acquired in whole or in part the share of a mortgagor because the mortgage debt is one and indivisible.** So also under section 67 of the Transfer of Property Act, a person interested in part only of the mortgage money cannot bring a suit regarding the corresponding portion of the property, **unless the mortgagees have, with the assent of the mortgagor, severed their interests** in the mortgage property.

The person entitled to redeem the mortgage must redeem **wholly.** Partial redemption is, as a rule, not allowed. Where, however, the interests of the mortgagees are, with the consent of the mortgagor, severed, partial redemption by the mortgagor can validly take place. Secondly, where the equity of redemption in a portion of the mortgaged property becomes vested in the mortgagee himself, partial redemption by proportionate payment by the mortgagor is allowed. But when the equity of redemption is vested in **one of the mortgagees**, the mortgagor can only redeem wholly, and not partially. (*Narayan v. Ganpat*, 21 Bom. 620).

#### **Can there be a Clog on the Right (Equity) of Redemption ?**

**There can be no clog on the equity of redemption.** Just as the mortgagee has the right of foreclosure, the right of sale, the right to sue on the personal covenant for repayment, so also does the mortgagor possess the right or the equity of redemption, *i.e.*, the right, even later, to pay up the mortgage amount and to free the property from the mortgage tie. Any covenant trying to restrict, postpone, or take away, the equity of redemption, is void, as being a clog on the equity or the right of redemption. (*Nokes v. Rice*, 1902, A. C. 24). Since the maxim is : **Once a mortgage, always a mortgage**, the mortgagor can pay up the mortgage amount even after the date for redemption or repayment of the mortgage money has passed. This equity of redemption can be exercised by the mortgagor, free from all restrictions. This is the meaning of saying that there can be no clog on the right of redemption. A stipulation whereby for failure of the mortgagor to repay the mortgage money at the due date the right of redemption has to be put off for a specified period of time is void. (*Sherkhan v. Dayal* 49 I. A. 60).

**Persons who can redeem Mortgages [Secs. 91, 92, 94, 95]****Subrogation**

The mortgagor, and all other persons interested in the property mortgaged and in the right of redemption, can redeem the mortgaged property. A creditor of the mortgagor who has, in an administration suit against the mortgagor, obtained a decree for sale of the mortgaged property, can redeem it. Any surety for the debt can redeem the property. (Sec. 91 of the Transfer of Property Act). When any of these persons, other than the mortgagor, redeems the mortgaged property, or when a co-mortgagor redeems the mortgaged property, he acquires, or is **subrogated to**, all the rights which the mortgagee had against the mortgagor. This is called **subrogation**. A person who lends money for redemption is also entitled to subrogation, if the contract so provides. (Sec. 92 of the Transfer of Property Act). The right of subrogation can only be claimed if the mortgage has been redeemed in full. When a co-mortgagor redeems a mortgage, he can claim the mortgage amount and also the costs of redemption of the mortgage. (Sec. 95).

The maxim is : **Redeem up, and foreclose down** ; and on this maxim are based sections 92 and 94 of the Transfer of Property Act. A person who advances money for enabling the redemption of a mortgage is subrogated to the rights of the mortgagee, if the contract so provides. This is **redeeming up**. And section 94 of the Transfer of Property Act is based on the maxim : **Foreclose down**. Where the property is mortgaged to successive mortgagees for successive debts, a mesne mortgagee can claim the same rights against the mortgagees taking after him as he has against the mortgagor. To get all the rights in the mortgaged property, the subsequent mortgagee must pay off all the prior mortgagees, *i.e.*, all who are before him or above him. **This is redeeming up**. As regards foreclosure, those who are prior mortgagees can foreclose as against those who are subsequent to them, *i.e.*, down them. **That is foreclosing down**.

**Rights of Mortgagee**

The rights of mortgagee are (1) rights **before** the date of repayment, and (2) rights **after** the date of repayment.

**(1) Rights before the date of repayment are as follows :—**

- (a) That of spending money necessary for the protection and preservation of the property from loss, destruction, forfeiture or sale.
- (b) That of supporting the title of the mortgagor to the property, and to spend money therefor.
- (c) That of spending money for keeping his own title.
- (d) That of renewal of the lease of the property, in case of the mortgage being a leasehold. He can claim the amount spent by him in renewing the lease, and can add that amount to the mortgage debt. (*Damodar v. Vamanrao*, 9 Bom. 437).
- (e) That unless there is a contract to the contrary, the mortgagee can add the money (spent by him under any of the above matters) to the principal money, and charge interest at the rate chargeable on the principal money, or, if no rate is fixed on the principal amount, then at 9 per cent. per annum. (Section 72 of the Transfer of Property Act).

As regards the expenses of management of the property and collection of rents, the mortgagee cannot add the same to the mortgage debt ; but he can deduct the amount of these expenses in the account of the money received by him. (Sec. 76 of the Transfer of Property Act.)

He can insure the property. He can claim the amount of the *premium* of insurance and can charge interest thereon at the same rate as on the principal. But when the mortgagor has already insured the property up to the amount allowed by the mortgage deed, or, if the mortgage deed is silent on the point, the amount equal to two-thirds the amount required, in case of total destruction, to have the property

reinstated, the mortgagee cannot and should not insure. When the mortgagor has not insured to the said amount, *i.e.*, the amount just stated in this paragraph, the mortgagee can insure upto the amount allowed by the deed or upto two-thirds the amount payable in case of total destruction. He should not insure to an amount exceeding the said amount.

**(2) The Rights of the Mortgagee after the date of repayment are as follows :—**

- (a) **The right to sue for the sale of the mortgage property or even for foreclosure where the same is allowed ; and wherever there is a covenant to pay the mortgage money, a suit for the enforcement of the personal covenant to pay the money can lie.** An equitable mortgagee has no right to foreclose ; nor can a simple mortgagee do so. A mortgagee by conditional sale can foreclose ; but he cannot sue for the money or for sale of the property. A usufructuary mortgagee cannot sue for foreclosure ; nor can he sue for sale of the property ; he has to wait and satisfy his claim by having the yields of the property. (Secs. 67 and 68 of the Transfer of Property Act). Under sect. 68 of the Transfer of Property Act, a mortgagee can sue for the mortgage money, if there is a covenant to pay the mortgage money, or if the mortgage security is found insufficient for the repayment of the money and the mortgagor has not paid the amount of the deficiency in spite of notice to him to pay, or if the mortgagor has wrongfully deprived the mortgagee of the property mortgaged, or if the mortgagor does not give or procure possession to the mortgagee. When the mortgagee discovers that the mortgage property is property over which the mortgagee could have no legal right, he can sue for the money, even before the date of repayment. (26 Bom. 241).
- (b) **He is entitled to the benefit of accession, subject to sec. 63.** (See under the heading RIGHTS OF MORTGAGOR).
- (c) **The mortgagee can pay off the amounts due to prior mortgagees, and then add that amount (so paid) to the mortgage debt due to him.** (Sec. 74).
- (d) **Subject to the provisions of Sec. 69 of the Transfer of Property Act, *i.e.*, in the cases only under Sec. 69, mentioned hereafter, in a separate note, under the heading : Cases in which the Mortgagee can sell the Property without Intervention of the Court.**

A mortgagee, it may be noted, can appoint a Receiver of the income of the property (Sec. 69A), in cases in which he can sell under Sec. 69, *i.e.* sell without intervention or sanction of the Court. Under Sec. 73 he can claim the surplus in the sale proceeds, where the mortgage property is sold away for arrears of land revenue or is acquired compulsorily.

**Cases in which Mortgagee can sell the Mortgaged Property without Intervention of the Court [Sec. 69, Transfer of Property Act.]**

A mortgagee can sell the mortgaged property without any intervention of the Court, upon default by the debtor to repay the mortgage amount, in any of the following cases :—

- (1) **When the mortgage is an English mortgage, in which neither the mortgagee nor the mortgagor is a Hindu, Mahomedan or Buddhist, or a member of any race, sect, tribe or class, specified in this behalf by the State Government with the sanction of the Central Government.**
- (2) **When the mortgagee is allowed under the mortgage instrument to sell the mortgaged property without the intervention of the Court, and the property or any part thereof was on the date of the execution of the mortgage, situated within the town of Calcutta, Madras or Bombay, or any other town or area which the Government may, by notification in the Gazette, declare to be the area for this purpose.**

Where the mortgagee is the Government, and the mortgage instrument gives the power to sell without intervention of the Court, such sale is allowed.

The mortgagee cannot sell the property without the intervention of the Court, unless :—

- (a) there has been a default of payment of the principal money for three months after service of the notice on the mortgagor requiring him to pay up the principal ; or
- (b) some interest under the mortgage amounting to at least Rs. 500 is in arrear and has remained unpaid for three months after it became due.

**Duties and Liabilities of Mortgagee in Possession [Sec. 76 of Transfer of Property Act].** The following are the duties of a mortgagee in possession :—

- (1) He must **manage the mortgaged property as a man of ordinary prudence would manage his own property.**
- (2) He must do his best to **collect, in a proper and lawful manner, the rents, yields and profits of the mortgaged property ;** and he is liable for, and must account for, not only what he has actually collected, but also what he **could have collected** had there been no wilful default on his part. (*Parkinson v. Hambury*, 2 H. L. 1.) He is **responsible for damage caused by the gross negligence of his agent.** (*Union Bank v. Ingram*, 16 Ch. D. 53.)
- (3) He **must pay out of the income of the property all revenue due to the Government, and must pay all other public charges** resulting during the possession of the property. He must **pay all arrears of rent ;** in default of payment of the same the property may be summarily sold.
- (4) He must **execute such necessary repairs to the property as can be paid for out of the balance of rents and profits of the property after deducting what he paid for interest and the revenue due to government, public charges and rent.**
- (5) He must not commit waste ; nor allow any one else to do so. He **must prevent waste.**
- (6) When the property is insured, and for any loss he has been paid by the insurer, he must **utilise the money in re-instating the property, or at the dictate of the mortgagor, in payment of the mortgage debt or towards diminution of the mortgage amount.**
- (7) He must **keep proper accounts of all sums received and spent by him as mortgagee. The mortgagor can ask for copies of such accounts duly supported by vouchers, provided the (mortgagor) tenders payment for the same.**
- (8) After deduction of the expenses mentioned in points (3) and (4) and the interest, the receipts from the mortgage property, or, where the property is occupied by the mortgagee himself, a fair rent for such occupation, should be utilised towards the reduction or payment of the interest on the mortgage debt or the mortgage principal in so far as such receipt exceeds the interest. If there be any balance the same goes to the mortgagor.
- (9) If the mortgagor tenders the amount due, the mortgagee must account for the **gross receipts from the property from the date of such tender.**

**Liability of Mortgagee for Non-performance of his Duties.**

The mortgagee would be liable to make good any loss or damage caused to the estate by his failure to perform his duties. From the money payable to him the amount of the damage can be deducted. And if the damage is in excess of the mortgage amount, the mortgagee shall remain liable to make good the same.

### Disabilities of Mortgagees

A mortgagee cannot purchase the mortgage property for himself. In the exercise of the power of sale of the property he cannot buy it himself. Nor can he take or accept a lease from the mortgagor.

### Foreclosure

Whenever, as seen already (while distinguishing between and studying the different types of mortgages), the mortgagee has the right of foreclosure he can do so.

Foreclosure means and implies the loss of the right possessed by the mortgagor to redeem the property. The failure of the mortgagor to pay the mortgage debt within the period allowed to him to do so, puts an end to his right of redemption of the mortgaged property.

### Opening a Foreclosure

Under the circumstances of a case, a Court of Equity may think it fit to allow the opening of a foreclosure, *i.e.*, **the mortgagor would be allowed to redeem the mortgage even after the foreclosure has been made absolute.** The mortgagor must give sufficient reason for having been unable to redeem in time. Foreclosure can be allowed to be opened in another case also. When the mortgagee has foreclosed but, finding or believing that the value of the property would not be sufficient for the discharge of the mortgage debt, he sues the mortgagor on the personal covenant to repay the money, the mortgagor gets once again an opportunity of redeeming the property and thus opening the foreclosure. (*Palmer v. Hendrie*, 27 Beav. 349.) If the mortgagee has already so dealt with the mortgaged property that he cannot fully restore it, *i.e.*, in its original condition, then he does not possess any right to sue on the personal covenant, because a mortgage involves **mutuality**. Equity will see that injustice is not done to the mortgagor.

### TACKING

#### English Law

When a subsequent mortgage is joined up with a prior mortgage there is a fusion of the mortgages. When the third mortgagee has lent money **without knowing** that there was already a mortgage on the same property, **the third mortgagee can take the first mortgage and claim priority over the second mortgagee.** The joining of the third mortgage with the first mortgage is called **tacking**. But if at the time the third mortgagee lent money he was aware of the existence of the second mortgage he cannot tack his mortgage, *i.e.* the third mortgage with the first mortgage. (*Brace v. Duchess of Marlborough*, 2 W. & T. 112.)

Section 94 of the Law of Property Act, 1925, in England, abolished tacking.

#### Indian Law

Under the Indian Law, tacking does not exist. It has been put an end to. Section 93 (of the Transfer of Property Act), which abolishes tacking, says: "No mortgagee paying of a prior mortgage, **whether with or without notice of an intermediate mortgage**, shall thereby acquire any priority in respect of the original security."

### Consolidation of Mortgages

The right (if any is conferred by express term in the mortgage instrument) of the mortgagee to call upon the mortgagor (who has given more than one mortgage to the mortgagee) to redeem **all the mortgages together** is called the right of consolidation of mortgages.

Under section 61 of the Transfer of Property Act, the right of consolidation can exist **if there is a term in the deed of mortgage giving the mortgagee that right, but not otherwise.** Sec. 61 does not allow consolidation, unless there is a contract allowing it.

A owes B Rs. 50,000 for which he has mortgaged in B's favour his (A's) property X. A owes B another debt of Rs. 100,000 for which he has mortgaged his property Y. Can B call upon A to redeem both these mortgages at the same time? Under the Transfer of Property Act (S. 61), **A cannot be compelled by B to redeem both**

these mortgages together, **unless the mortgage deed gives him such right to have the mortgages consolidated, i.e. redeemed together.**

A mortgagor cannot redeem one only of two or more properties comprised in the **same mortgage**. The mortgagee can have the mortgagor redeem all the properties together. (Hall v. Howard, 32 Ch. D. 430.)

In England, under the Conveyancing Act, 1881, the doctrine of consolidation does not apply.

### **The Doctrine of Marshalling**

Under the doctrine of marshalling (explained in *Lanoy v. Duke of Athol*, 2 A. & K. 447, and *Aldrich v. Cooper*, 8 Ves. 382 since modified), it is open to the subsequent mortgagee, **unless there be a contract to the contrary**, to have the prior mortgage debt satisfied out of a property or properties not mortgaged to him so far as the same is possible, without prejudicing the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the mortgaged properties. (Section 81 of the Transfer of Property Act.)

A, the owner of two or more properties, mortgages them all to X, and afterwards remortgages one of these properties to Y. Y can ask X, unless there be a contract to the contrary, to have his (X's) claim satisfied, as far as possible, out of the property or properties **not** mortgaged to Y and to leave alone the property actually mortgaged to Y, so that Y can rely on that property as security for his claim against A. This, however, is subject to the fact that X gets enough out of the other properties, and that any other person or persons who had for consideration acquired an interest in the property do not suffer.

### **The Right to Contribution**

If two or more persons have distinct and separate rights of ownership in the same property mortgaged to a creditor, those different shares in or parts of the property are, **unless there is a contract to the contrary, liable to contribute rateably to the mortgage-debt**, and for that purpose the value shall be deemed to be the value at the time of execution of the mortgage less the amount payable to any other mortgagee at that date. [Sec. 82 of the Transfer of Property Act].

## **FORMS OF MORTGAGES**

### **FORM No. 1**

#### **FORM OF A SIMPLE MORTGAGE**

THIS INDENTURE made this.....day of.....19 , between.....  
.....(name of the mortgagor) of.....  
(address of mortgagor), hereinafter called the mortgagor, of the one part, and.....  
(name of the mortgagee) of.....(address of the mortgagee) of the other part :

WITNESSETH THAT in consideration of the principal sum of Rupees.....  
(Rs.....) now paid by the mortgagor to the mortgagee, the receipt whereof the mortgagor acknowledges, the mortgagor doth hereby covenant as follows :—

(1) That the mortgagor will repay to the mortgagee, on the.....day of.....  
.....19 , the sum of Rupees.....(Rs.....) with interest thereon  
at.....per cent. per annum from the date of these presents. The said interest  
shall be paid annually on the.....day of.....19 . [Now state the consequences of non-payment of the interest.....whether compound interest will, in that case, be payable.]

(2) As security for the repayment of the said mortgage money the mortgagor doth hereby transfer by way of a simple mortgage the right in the property given and described below :—

All that property bearing Municipal No.....city survey No.....,  
situate within the.....Registry, in the (place), District of.....  
and admeasuring.....acres, and surrounded on the East by the houses  
and land of.....(name of owner of the property) on the.....road,  
and bounded on the West by the property of.....(name of owner) on the.....



.....road/street, and on the North bounded by the land of.....  
 (name of owner) adjoining.....and on the South by the property of on the.....  
 .....road.

(3) If the said mortgage money or any portion of it remains unpaid on the.....  
 day of.....19 .. the mortgagee shall have the power to have the said hereby mortgaged  
 property sold and to pay himself out of the sale proceeds the mortgage amount payable to him.

(4) The mortgagor hereby enters into a personal covenant to pay the mortgage money  
 on or before the.....day of.....19 .. and if he does not pay the same,  
 the mortgagee shall have the right to sue him for the recovery of the said amount and the costs  
 of the suit.

IN WITNESS WHEREOF the parties hereto have hereunder put their hand and seal the  
 day and the year first abovewritten.

The signature of the mortgagor.....In the presence of.....  
 .....(witness's signature).

The signature of the mortgagee.....In the presence of.....

### FORM No. 2

#### FORM OF MORTGAGE BY CONDITIONAL SALE

[Follow Form No. 1—First 2 paragraphs. But add therein the following paragraph after  
 the first paragraph ] :—

WHEREAS the mortgagor is absolutely entitled to the property hereinafter described, free  
 from encumbrances

Then add the 2nd paragraph in Form No. 1.

Then add covenants (1) and (2) of Form No. 1.

Instead of covenant (3) of Form No. 1, have the following covenant as covenant (3) :—

(3) If the said mortgage money or any portion of it remains unpaid on the.....  
 day of.....19, the mortgagee shall have the right of foreclosure and this con-  
 veyance shall thenceforth be treated as one of absolute sale, with all the legal consequences  
 thereof. But if the said money is so paid up, then the mortgagee shall reconvey the said pro-  
 perty to the mortgagor.

[Then omit covenant (4) of Form No. 1, and add the rest as in Form No. 1.]

### FORM No. 3

#### FORM OF USUFRUCTUARY MORTGAGE

Follow Form No. 1, and add the following paragraph after para. 1 (of Form No. 1) :—

WHEREAS the mortgagor is absolutely entitled to the property hereinafter described free  
 from encumbrances :

Then write out as in Form No. 1, but omit covenants (3) and (4) of Form No. 1, and instead  
 insert the following Covenants :—

(3) The mortgagor shall within.....days of the execution of these presents give  
 and procure possession of the said property to the mortgagee.

(4) The mortgagee shall have the right to remain in possession and to have the rents and  
 profits and yields of the property in lieu of interest on the mortgage money or partly towards  
 interest and partly towards the principal amount, till the whole of the mortgage amount so gets  
 paid up.

(5) If and when the mortgagor pays the said mortgage money the mortgagee shall reconvey  
 the said property and give back possession of the said property to the mortgagor.

Then add the last "In witness whereof" clause.

### FORM No. 4

#### FORM OF ENGLISH MORTGAGE

[Follow Form No. 1, but after Covenant (4) and before the "In Witness whereof" clause,  
 add the following Covenant :—

The mortgagee shall be entitled to hold the property unto his use absolutely and till the  
 mortgagor repays to the mortgagee the said mortgage money on the.....day of..... 19  
 In case the mortgagor so repays the said mortgage money on the said.....day of.....19  
 the mortgagee shall reconvey the said property to the mortgagor.

## Form No. 5

**FORM OF MORTGAGE BY DEPOSIT OF TITLE-DEEDS**

[No particular form is required. Any writing which shows the existence of the mortgage and the true intent to create a mortgage is sufficient evidence, if the fact of the deposit of title-deed is mentioned or proved.]

## Form No. 6

**FORM OF MORTGAGE OF MOVABLES**

Follow the form of a mortgage of immovables (like Form No. 1, but mention the movable property (like household furniture, or whatever it may be). Follow Form No. 1.

## Form No. 7

**FORM OF SUB-MORTGAGE**

THIS INDENTURE made this.....day of.....19 , between .....(name of mortgagor) of.....(address of mortgagor) of the one part, and.....(name of mortgagee) of.....(address of mortgagee) of the other part :

WHEREAS by an Indenture of mortgage, hereinafter referred to as the Recited Indenture made the.....day of.....19 , between one.....(name of the original mortgagor) of.....(his address) of the one part and.....(name of mortgagor i.e., original mortgagee) the said.....(name of original mortgagor) the property described in that Indenture was conveyed to the.....(name of mortgagor—original mortgagee) by way of.....(simple/by conditional sale/usufructuary/English) mortgage as and by way of security for the repayment of the principal sum of Rupees.....(Rs.....) with interest thereon at the rate of Rupees.....(Rs.....) per cent. per annum, AND WHEREAS the said.....(name of original mortgagor) has the right of redemption by payment of the said principal sum and interest thereon on the.....day of.....19 . AND WHEREAS the said mortgage money is still due to the said original mortgagee (i.e., the mortgagor under this Indenture) AND WHEREAS the mortgagee (under this Indenture) has agreed to lend a sum of Rupees.....(Rs.....) to the.....(mortgagor under this Indenture) upon repayment (by the mortgagor) to the mortgagee of the said mortgage money.

**NOW THIS INDENTURE WITNESSETH THAT :—**

In consideration of the said sum of Rupees.....(Rs.....) now paid by the mortgagee to the mortgagor, the receipt of which the mortgagor hereby acknowledges, the mortgagor hereby covenants as follows :—

That he will pay to the mortgagee the said Sum of Rupees.....(Rs.....) on the.....day of.....19 , with interest thereon at Rs.....per cent. per annum from the date of these presents, payable annually, on the.....day of.....19 .

[Now mention the consequences of non-payment].

The mortgagor hereby assigns to the mortgagee all that the principal sum of Rupees.....(Rs.....) with interest thereon under the Recited Indenture and all the benefits of the security for the same and the power of sale : TO HOLD the same unto the mortgagee subject to redemption thereof by payment on the said.....day of.....19 , of the said mortgage money.

The mortgagor hereby assigns and transfers unto the mortgagee all the property comprised in and transferred by the Recited Indenture : TO HOLD the same unto the transferee subject to redemption clause contained in the Recited Indenture and subject to the provision for redemption herein before mentioned.

[Now add a clause giving the mortgagee the right to have the mortgaged property sold and to satisfy his claims from the sale proceeds.] —Same as in Form No. 1.

Now add the "IN Witness Whereof" clause.

## CHAPTER XXVIII

### COPYRIGHT, TRADE-MARKS, PATENTS AND DESIGNS

#### What is Copyright ?

Copyright is **the right to reproduce or to have copies of any original work, performance or speech, or any substantial part of it.** Not only an artistic, literary, musical or dramatic work, which is original both in thought and expression, but also a technical or scientific work, has got a copyright attached to it. The originality lies not only in the thought **but also in the manner of expression.** Copyright includes the right to publish an unpublished work. It attaches to public performances also.

The author of the work or his assignee, has the **exclusive** right to reproduce the work, in any form. When the author has sold or assigned his copyright to the publisher, the publisher gets the copyright.

#### What is Publication ?

By **publication** is meant the issuing of copies of a work to the members of the public. And a **copy** of a work means something so similar to the original as would suggest, to the mind of the reader or the audience, the original work. (Mahendra v. Emperor, 33 C. W. N. 172.)

#### What is an Original Work ?

An **original work** means any work which involves the exercise of some degree of thought and labour in the arrangement, selection or abridging of the material ; there is, in an original work, some originality in the composition, in the mode of expression, if not in the realm of really original thought. There is copyright even in a collection of selected verses. (Macmillan v. S. Deb, 17 Cal. 951.) A poem written by a poet, a picture painted by an artist, a drama written by a dramatist, or a novel by a novelist, may be an original work. But the meaning of 'original work' is not confined or restricted to such works ; **it extends even to merely technical works, where the thought may not be new,** where it is based on common material but the expression is novel or is such as involves an element of labour and skill. Novelty or ingenuity of expression is not essential, though desirable. (Macmillan Co. v. Cooper, 48 Bom. 308.) But a colourable imitation or artful disguise does not make a work an original work ; there is an infringement of copyright. (King Features Syndicate v. Kluman Ltd., 1941, A. C. 417 ; Mohan v. Sitanath, 34, C. W. N. 540.)

#### Wherein does Copyright lie ?

Copyright does not lie so much in an idea as in the **expression** of an idea. (Gopal Das v. Jaganath, 1938, A. L. J. 390.) Even though the original idea may be another person's, yet if the work is **composed or expressed in an original or different manner,** the work that is composed is a new work different from the original work, and then there would not be an infringement of copyright. (Campbell v. Scott, 12 Sim. 31.) But then where another person's original idea is taken by a writer **he must acknowledge the original writer's authorship, and must not plagiarise.**

No copyright lies in works which are immoral, libellous or unlawful:

There is copyright in constructing or exhibiting architectural works and works of art. (Meikle v. Maufe, 1941, 3 A. E. R. 144.)

#### Duration of Copyright

As a rule, the right (*i.e.*, copyright) endures for the lifetime of the author and a period of fifty years thereafter.

So far as **translations** of works are concerned, under section 4 of the Indian Copyright Act of 1914, in the case of a work first published in India, the exclusive right of the author or the publisher, or the assignee of the copyright, subsists only for a period of ten years after the publication of the work in India. This is in so far as it concerns **translation only** of the work from the language in which it was first published in India, into some other language.

In the case of unpublished or unperformed works, copyright subsists till the work is published or performed and for a period of fifty years after that.

Where a work is that of **joint authors**, copyright subsists till the death of the author who first passes away and for fifty years after his death, or during the lifetime of the author who passes away last, **whichever is the longer period**.

### Infringement of Copyright

The publication of somebody's unpublished work is an infringement of copyright. So also copying from another writer's work a **material** portion amounts to infringement. Even a translation of another's work may amount to infringement of copyright. A **colourable imitation** of another writer's work is **infringement**. (King Features Syndicate v. Kluman, 1941, A. C. 417.) A song is a literary work and to reproduce it in the form of a gramophone record would, if unauthorised, amount to an infringement of copyright. The taking of a photograph from a painting or work of art, or the taking of a print or an enlargement from a negative belonging to or taken by another person, would amount to an infringement of copyright, if the consent of the owner of the copyright has not been taken.

There is copyright even in works, such as maps, charts, sketches, plans, tables lectures, sermons and addresses, and an infringement of the same gives the aggrieved party the right to take legal steps against the infringer. (Anderson & Co., Ltd. v. Lieber Code Co., 1917, 2 K. B. 469.)

Where in a subsequent work by a writer there are the same errors as in another first published work of a different author, those errors are a good evidence to suggest piracy. (Leslie v. Young, 1894, A. C. 335). Even if the first edition of a work which involves the infringement of copyright was not challenged by the owner of the copyright in the pirated work, its second or subsequent edition can be challenged; there is no bar to that. (Hogg v. Sooth, L. R. 18 Eq. 444.)

### Remedies for Infringement of Copyright

The infringer of copyright may be **prosecuted** in a Criminal Court; and his offence may be that of plagiarism. Plagiarism is theft of an idea of another writer. It is a deliberate passing-off as one's own idea what really is another writer's. **The aggrieved party can sue the wrong-doer (the infringer) for damages and/or injunction, in a Civil Court. He can claim the profits earned by the infringer by the wrongful sales by him, and can claim damages for conversion.** (Sutherland Publishing Co. v. Caxton Publishing Co., 1939, A. C. 178; Ash. v. Hutchinson Co., 1936, Ch. 489.)

In case of infringement of copyright by publication outside India, the owner of the infringed copyright can have, by notice to the Chief Customs Officer, the infringing articles regarded as prohibited import. (Sec. 6 of the Indian Copyright Act of 1914.)

### Defences to an Action for Infringement

In a suit for infringement of copyright, the following are some of the good defences :—

(1) That the act of the defendant was **no more than a fair handling of, or dealing with, the plaintiff's work**, for the purpose of private study, research, criticism, review, or newspaper summary. (Kartar Singh v. Ladhe Singh, 1934, 16 Lah. 103.)

(2) That the act of the defendant was only the making or publishing of a painting, drawing, engraving or photograph of a work of sculpture or artistic craftsmanship, permanently situated in a public place or building, or that it was only the making or publishing of a drawing, painting, photograph or engraving (not in the nature of an architectural drawing or plan) of an architectural work of art.

(3) That the defendant's act or work was merely that of publication, in a newspaper, of a report of the plaintiff's lecture **delivered in public, unless the reporting was prohibited beforehand by a conspicuous written or printed notice affixed before and kept during the lecture at or about the main entrance of the place where the lecture was delivered** (in which case there would be an infringement of copyright in the lecture.)

(4) That the defendant merely read or recited in public **a reasonable extract from the plaintiff's work.**

(5) That the act was **only a reading or reciting** in public from any work having a copyright.

(6) That the act of the defendant lay in a publication of collections from works, **bona fide made for the use of schools, if the source is acknowledged and the defendant has not taken from the same author more than one passage.** (*Educational Depot v. Tagore*, 1933, 55 All. 564.)

### Assignment of Copyright

The person who possesses the ownership of copyright may assign his copyright wholly or in part, either generally or subject to limitations, provided the assignment is in writing and is signed by him the owner or his authorised agent in that behalf. The Deed of Assignment must be properly stamped. For Stamp Duty see the Chapter on Stamps—the List of Stamp Duties on Documents. Unless made by will, the assignment shall not operate after twenty five years after the death of the author. The reversionary interest will devolve upon his legal representatives. (The Copyright Act.)

### Form of Assignment of Copyright

[Stamp] (See Stamp Duties)

THIS INDENTURE made this.....day of.....19 ,  
between X. Y. of.....(address of X. Y.), (hereinafter called the  
Assignor of the one part) and.....P. Q. of.....(address  
of P. Q.), hereinafter called the Assignee of the other part :

WHEREAS the Assignor is the Author of the work entitled.....  
(State the title or the name of the work) and therefore the sole owner of the copyright therein,

AND WHEREAS the Assignor has, in consideration of a sum of Rupees....  
.....(Rs.....) (or state the other consideration), agreed to assign  
to the Assignee his copyright in the said work, by an agreement dated.....  
.....19 ..

NOW THIS INDENTURE DOTH WITNESS that in accordance with and  
in pursuance of the said agreement and in consideration of the said sum of Rupees....  
.....(Rs.....) now paid by the Assignee to the Assignor, the receipt  
of which the Assignor hereby acknowledges, the ASSIGNOR HEREBY DOTH  
ASSIGN UNTO THE ASSIGNEE the copyright in the said work, with all the rights  
usually appertaining thereto, including the right of the Assignee, his heirs, successors,  
executors, administrators, assigns, to print and/or publish subsequent editions, and/  
or, to have reprints and subsequent reprints of the work, in any language whatever,  
thus with the power to translate the said work by reliable translators.

IN WITNESS WHEREOF the parties hereunto have put their hand and seals  
the day and the year first above written, in the presence of.....(witnesses).

## TRADE-MARKS

## What is a Trade-mark ?

Any mark, sketch, picture, number, name, signature or used by a trader, to **distinguish his goods from goods of other** called a trade-mark. A trade-mark, under the Trade-marks any trade-name which is a **distinctive name, and not mere descriptive adjectival name**. Thus the name "Kodak", "Voiglander", or "Oliver", can be regarded as a distinctive name. But a name merely showing the country in which the goods are manufactured, e.g., "India", "Hind", "Pakistan", "England", is not a name which can really be used to distinguish a trader's goods from those of another trader. So also, an adjectival name, e.g., "best" or "supreme" cannot be regarded as a distinctive name. Such non-distinctive names cannot be accepted for registration as trade-marks. The mark of a key which is to be found impressed on. "Godrej" soaps can be regarded as a trade-mark.

## What are the Purposes Served by a Trade-mark ?

A trade-mark serves the useful purposes (1) of distinguishing a trader's goods from those of other traders, and (2) of showing the ownership and origin of the goods

## Registration of Trade-marks

The Trade-Marks Act, 1940, has provided a very useful means of protection of traders having legitimate trade-marks, by providing for optional registration of trade-marks and trade-names. The expression "trade-marks" includes "trade-name". Registration helps the trader against infringement, and, by giving a cause of action different from that under an action for passing-off goods as those of another trader, affords good protection. Registration creates also *prima facie* evidence that the registered trade-mark really belongs to the trader who claims it, thus saving so much of time and expenditure, though proof to the contrary can be brought by the defendant. Registration is *prima facie*, but not conclusive, evidence of the ownership of the trade-mark.

Under the Trade-Marks Act, 1940, Registration helps also when international protection is sought. It enables the better enforcement of rights to trade-marks.

An **action for infringement of trade-mark** can be brought if the trade-mark is registered under the Trade-Marks Act, 1940, **but not otherwise**. If the trade-mark is not so registered, then an action for **passing-off** goods as those of another can lie.

We must then consider what trade-marks are registerable.

## Trade-marks Capable of Registration

For registration under the Trade-marks Act, 1940, the mark must be a **distinctive** mark, and not a mere descriptive mark or name or an adjectival name, i.e., a name like "Superfine", "excellent" showing merely the quality of the goods, or a name showing merely the place of manufacture, e.g., "India", "China", "Liverpool". (Liverpool Cable's case, 1926, 46 R. P. C. 99. In the Application of India Electric Works Ltd., 49 C. W. N. 425.) No mark which contains any matter the use of which disentitles protection in a Court of Equity, can be registered under the Trade-marks Act. [Sec. 6 of the Trade-marks Act, 1940.]

## Application for Registration

An application for registration of a trade-mark must be made to the Registrar of Trade-marks, giving particulars regarding and containing: (1) the name of a company, firm or individual, represented in a particular or special manner; (2) the

signature of the applicant for registration or some predecessor of his in business ;  
ing (3) one or more invented words ; (4) one or more words of a distinctive character,  
s' and having no direct reference to the character or quality of the goods, and not being  
according to its ordinary signification, a geographical name or surname or the name  
of a sect, caste or tribe in India.

(Sec. 6 of the Trade-Marks Act.)

Under sec. 8 of the Act, no trade-mark or any part thereof can be registered, if it has any scandalous design or any thing which would cause confusion or deceit and therefore would not be given protection. It will not be registered if it is capable of causing hurt to the religious susceptibility of any community or class, or if it is opposed to public policy or good morals or if it is against the law. In the case of a Chemical composition, no word which is ordinarily used and accepted as name of any single chemical compound can be registered as trade-mark unless the word is used to denote only a brand or make of the element or compound as made by the owner or the registered owner of the trade-mark, or distinguished from the element or compound as made by others, in association with a suitable name or description open to the public eye.

**Identical or similar trade-marks cannot be registered.** Where different persons simultaneously apply for having their trade-marks registered, and when the trade-marks are similar or identical, in respect of the goods, the Registrar may refuse to register any of these trade-marks unless the rights of the applicants have been decided by a competent Court.

The application must be submitted to the Registrar, in the prescribed manner.

The registration shall last for seven years. Thereafter the registration may be renewed, from time to time, for a period of fifteen years from the date of the original registration, or of the last renewal, as the case may be.

### Effect of Non-registration ?

Sec. 20 of the Trade-marks Act provides that no person can institute any suit for injunction or damages and account of profits, against the infringer, **unless the trade-mark has been, without a break, in use since before the 25th of February 1937**, by such person or by his predecessor in title and unless an application for its registration is made within 5 years from the commencement of the Act and has been refused. But any action against the wrong-doer for passing off the goods as his own can be brought, against the wrong-doer.

### Infringement of Trade-mark

Any person who wrongfully uses the trade-mark belonging to another person's goods or who makes it so closely or colourably imitated so as to make the members of the public and others dealing with him believe that his goods are those of the trader whose mark he has infringed by colourable imitation or by causing deception or by misguiding the unwary members of the public, is said to have infringed the trade-mark of the other person. (*Sugar Mills Ltd. v. Tata Oil Mills Co.*, 1943 45 B. L. R. 195.) There should not be any likelihood of deception. If there is likelihood of deception, there is an infringement. (*Havana Cigar & Tobacco Factories v. Oddenino*, 1924, 1 Ch. 179 ; *Jacques v. Chus*, 1940, 2 A. E. R. 285 C.A.)

### Remedies for Infringement of Trade-mark

The wrong-doer (the offender) can be prosecuted in a Criminal Court, for infringement of trade-mark is a crime also. The aggrieved party's civil remedy is by way of (1) **suit for damages against the infringer or account of profits and/or, orf injunction to prevent the wrong-doer carrying on with the mischief or injury**

He can claim damages for conversion. (Sutherland Publishing Co., 1939 A. C. 178; *Ash v. Hutchinson*, 1936 Ch. 489.)

Where the trade-mark is not registered under the Indian Trade-marks Act, 1940, the remedy of the aggrieved party is that of an action for passing-off goods as those of another. An infringement action cannot lie if the trade-mark has not been registered.

### Passing-off Action

An action for passing-off is an action whereby the plaintiff (aggrieved party) seeks redress for the defendant's false representation in making the members of the public (buyers) believe that the goods sold by the defendant are those of the plaintiff. (*Singer Machine Manufacturers v. Wilson*, 1877, 3 A. C. 376.) The false representation need not be a direct one; it may even be by conduct of the defendant, i.e., by the actual use of the distinctive name, number, mark, design, or get-up of the plaintiff's goods. It is immaterial whether the defendant had an intent to deceive or not (*Draper v. Trist*, 1939, 3 A. E. R. 513 C. A.); nor is it necessary to show actual damage. (*Draper v. Trist*, 1939, 3 A. E. R. 513 C. A.) The defendant's conduct must be likely to cause confusion or deceit, or to misguide the unwary members of the public. (*Singer Manufacturing Co. v. Loog*, 1882, 8 A. C. 15, 18.)

### Infringement Action

Under the Trade-marks Act, 1940, a trade mark (includes trade name) can be registered, if the owner has a **distinctive** name, number or mark (but not merely if it is a geographical name or the name of the country of manufacture), and if he is really the owner of it, and there is no other person or company or firm or body actually holding the same name or mark. On registration (which is optional and very advantageous) the owner of the trade-mark is protected, and can bring what is known as an **infringement action** against the infringer. An infringement action cannot be brought if the trade-mark is not a registered trade-mark. But even if the trade-mark is not a registered trade-mark, a **passing-off action** can be brought, though an infringement action is precluded.

### Advantages of an Infringement Action over a Passing-off Action

Often even an otherwise good case fails if brought on a passing-off action, while if it had been brought on an infringement action the plaintiff would have succeeded. Even if the goods are different, the plaintiff would succeed if he can show that there has been an infringement of his trade-mark or trade-name.

### Difference between a "Passing-off Action" and an "Infringement Action"

The following are the points of difference between a "Passing-off Action" and "Infringement Action".

(1) A passing-off action is **not based on any proprietary right, but on the tort of deception**. An infringement action is based on the **infringement of proprietary right** for a trade-mark is in the nature of property. (*Clement v. Maddick*, 1859, 1 Giff. 98.)

(2) In a passing-off action **the issue is whether the defendant has passed off his goods as those of the plaintiff**. The plaintiff has to prove the mere probability of deception. It is not necessary to show that there was any mark or name used by the defendant as colourable imitation of the plaintiff's mark or name. **A mere representation by the defendant that the goods were those of the plaintiff is enough**. In an action for infringement of trade-mark the plaintiff has to prove that (1) he has a **proprietary right**, i.e., the exclusive right to use that trade-mark, and (2) **the defendant is using the same mark or a mark so similar as would misguide the unwary members of the public**.



(3) In an infringement action it must be shown that the plaintiff was the first person to have used that mark. In a passing-off action the plaintiff need not be the first person to have used that mark. The very fact that the mark had become famous shows that it must have been used for a considerable time.

(4) In a passing-off action it must be shown that the mark is known to the members of the public; but in an infringement action it need not be proved that the mark is well-known. (In *Nicholson's Application*, 1931, 48 R. P. C. 227 at p. 253.) The person who has used the distinctive mark (the mark must be really distinctive, and not merely restricted to showing the place or country of manufacture or showing the quality of the goods) first can sue even a person who uses it only a little later. A mere descriptive mark has no proprietary value. So the name "Nourishing" used for stout is merely a descriptive mark showing quality; it is not an actionable mark. (*Ragget v. Findlater*, 1873, L. R. 17 Eq. 29.)

(5) In a passing-off action, the issue before the Court is: Is the defendant passing off his goods as those of the plaintiff? In an infringement action the issue is: Is the mark used by the defendant the same as or colourable imitation of the plaintiff's trade-mark? In a passing-off action it may be proved that the get-up of the goods is so similar to the plaintiff's that the members of the public may be led to believe that the goods are those of the plaintiff's make. The deceptive get-up is sufficient evidence in this matter.

### Assignment of Trade-mark

The owner of a registered trade-mark can assign it. An unregistered trade-mark is assignable and transmissible, provided that, except in connection with the goodwill of a business, assignment or transmission can take place only if—

- (a) at the time of assignment or transmission, it is used in the same business as a registered mark; and
- (b) the registered trade-mark is assigned or transmitted at the same time and to the same person as the unregistered trade-mark; and
- (c) the unregistered trade-mark relates to goods in respect of which the registered trade mark is assigned or transmitted.

Further sections 31 and 32 of the Act provide restrictions, on assignments or transmissions, where multiple exclusive rights would be created or where exclusive rights would be created in different parts of India.

### What is a Patent ?

A patent is a grant made by the Central Government to the first inventor of any invention, or to his legal representative, to have the sole right to enjoy the fruits of his mental labours (his invention).

### Application for, and Grant of, Patent

An application for a patent may be made to the Patent Office, in the prescribed form and in the prescribed manner. The applicant must declare that he, or, in the case of joint applicants, at least one of them, is the true and first inventor, or the legal representative or assignee of such inventor. The nature of the invention must be specified and described.

When the Controller deems it desirable, he may require that suitable drawings shall be supplied at any time before the acceptance of the application. He may require even a model or sample of the invention. [Sec. 3 (5).]

Under sec. 6 the Controller must give notice to the applicant and must advertise the acceptance of the application when he has accepted the application.

Under sec. 9, a grant of patent may be opposed on any of the grounds mentioned in that section.

### **Consequences of Grant of Patent**

Sec. 10 provides that when a patent is granted the Controller shall cause the patent to be sealed by the Patent Office. The Patent shall, subject to the provisions of the Patents and Designs Act, 1911, confer on the patentee (the grantee of the patent) the **exclusive** privilege of manufacturing, selling and using the invention (goods according to the invention) throughout India. The patentee can authorise other persons also to so make, sell and use goods according to the invention.

### **Term of Patent [Secs. 14, 15.]**

The duration of a patent is, as a rule, **sixteen years from its date.** [Sec. 14.] But the term of patent can be extended by the Central Government. A patentee can, under section 15, petition to the Central Government for extension of the duration of his patent, on the ground that the patentee had not so far received sufficient yields or fruits of his invention. The Central Government, or the High Court, as the case may be, may by order extend the term of the patent for a further term not exceeding five (or in exceptional cases ten) years, or may order the grant of a new patent for such term not exceeding ten years as may be specified in the order, subject to any restrictions or conditions which may be imposed.

### **Assignment of Patent**

The owner of a patent can assign it to some other person, and such person can then enjoy the sole right during the period the right lasts.

The legal representatives of the first inventor would be entitled to the benefits of the patent during its duration.

### **Form of Assignment of Patent**

[Follow the Form of Assignment of Copyright, with the necessary statement of facts.]

### **Models to be furnished to Indian Museum**

Under section 41, the Trustees of the Indian Museum may, at any time, require a patentee to furnish them with a model or sample of his invention on payment to the patentee of the cost of the manufacture of the model or sample, the amount to be settled by the Central Government in case of any dispute about it.

### **Remedies for Infringement of Patent**

The infringer may be prosecuted in a Criminal Court or may be sued in a Civil Court. The owner of the patent may sue the infringer for damages and/or injunction. He will be allowed a satisfactory compensation for the damage suffered by him by the infringement, and the Court will also restrain the infringer from carrying on with the wrong-doing. He can sue for an account of the profits wrongfully made by the defendant by the wrongful use of the patent.

## **DESIGNS**

### **What is a Design ?**

Sec. 2 (5) of the Patents and Designs Act, 1911, defines a "design", as "the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the

eye ; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device," and does not include any trade-mark or property mark.

### **Registration of Designs**

Under section 43 of the Patents and Designs Act, 1911, the Controller may, on the application of a person claiming to be the owner of any new or original design (not previously published in India), register the design under the Act.

### **Copyright in Registered Designs—Term of Copyright**

**The owner of a registered design possesses, subject to the provisions of the Patents and Designs Act, 1911, a copyright in the design during five years from the date of registration of the design. [Sec. 47.] But if before the expiration of this period of five years an application is made to the Controller for extension of the period of copyright in the design, the period of copyright will be extended by a further period of five years from the expiration of the original period of five years. And if before the expiration of the second period of five years an application is made to the Controller for extension, the Controller may grant a further (third) period of five years from the expiration of the second period of five years.**

### **Remedy for Infringement**

If a registered design is infringed, the owner of the registered design can sue the infringer for damages and/or injunction. He can also sue for accounts of profits.

## CHAPTER XXIX

### LAW OF STAMPS

The Indian Stamp Act, 1899, gives us the law relating to Stamps on Documents. The Stamp Act tells us what different kinds of stamps are, and how stamps are to be used and cancelled. A list of stamp duties on various documents is also given in the Stamp Act.

#### Kinds of Stamps

We have (1) what are known as **adhesive stamps**, and (2) **impressed or engrossed stamps**—embossed or impressed on paper which is used for the document concerned. The document may be typed on the stamp paper.

#### Use of Stamps

Adhesive stamps may be used on the following documents :—

- (1) A document showing admission or entry of a person as an Advocate or Attorney of a High Court when his name is enrolled ;
- (2) Transfer of shares in a registered Company ;
- (3) Notarial acts ;
- (4) Instruments chargeable with a stamp duty of one anna or half-an-anna, excepting parts of bills of exchange payable otherwise than on demand, drawn in sets ;
- (5) Bills of exchange and promissory notes drawn or made outside India.

[Section 11 of the Indian Stamp Act]

An adhesive stamp when used must be duly cancelled, by writing of the signature of the maker of the document, or by writing the date thereon or by putting just a cross or a mark, so that the same stamp cannot be used again. If the stamp is not cancelled, the document will be deemed unstamped, and it is not admissible in evidence in a Court of Law, unless the penalty and the stamp duty are paid. If the amount of the penalty is less than Rupees five, then Rupees five must be paid (as the least amount). In the case of an unstamped receipt the penalty is one rupee. (Sec. 35 of the Stamp Act.)

A cash memo does not require a stamp. A counsel's fee receipt does not need any stamp. A receipt of more than Rs. 20 does require 1 anna stamp.

Postage stamps cannot be used on documents requiring to be stamped under the Stamp Act. These should not be used.

In a criminal case the defence of want of stamp on a document requiring stamp cannot be taken. So also the defence of want of stamp is not available against the government.

In the absence of a contrary provision in a contract, the expense of providing the required (proper) stamp shall be borne by the person executing, drawing or making the instrument, in the cases of Administration bond, Agreement relating to deposit of title deeds, pawn or pledge, Bill of Exchange, Bond, Bottomry Bond, Customs Bond, Debenture, Further Charge, Indemnity Bond, Mortgage Deed, Promissory note, Release, Respondentia Bond, Security Bond, Settlement, Transfer of shares in a Company or other body corporate, Transfer of Debentures, except debentures provided for by sec. 8, Transfer of any interest secured by a bond, mortgage deed or insurance policy. In the case of a conveyance the expense of stamp shall be borne by the grantee, and in the case of a lease or an agreement to

lease by the lessee or the intended lessee, unless there is a contract to the contrary. In the case of counterpart of a lease the expense shall be borne by the lessor. In the case of an instrument of exchange the expense of stamp shall be borne by the parties in equal shares, unless there be an agreement to the contrary.

### Adjudication as to Stamps

In case of any difficulty or doubt as to the proper stamp required on a document the Stamp Office will adjudicate the Stamp Duty if the fee for such adjudication is paid and the document sent for adjudication of the required stamp.

## NOW FOLLOWS THE LIST OF STAMP DUTIES ON DIFFERENT DOCUMENTS

### STAMP DUTIES ON DOCUMENTS

N.B.—In determining a stamp duty, care must be taken to determine whether there is any provincial surcharge. At present, there is, in the province of Bombay, a surcharge of 50 per cent. The Stamp Office would not mind informing about a surcharge if any. Subject to any surcharge or special levy, the stamp duty, at present, is as given here. The document concerned must be stamped before it is signed and executed.

#### DOCUMENT

#### STAMP DUTY

##### ACKNOWLEDGMENT OF A DEBT

exceeding twenty rupees in amount or value, written or signed by, or on behalf of, a debtor in order to give evidence of the existence of the debt in any book (other than a banker's pass-book) or on a separate piece of paper when such book or paper is left in the creditor's possession.

... One anna

(Adhesive stamp or  
coloured impression)

In Bihar, C. P. & Berar the duty is  
two annas.

But a promise to pay a debt, or a stipulation to pay interest on a debt or to deliver any property requires to be stamped as an agreement.

For stamp duty on Agreements, see under "Agreement".

**AFFIDAVIT**, i.e., a statement on oath, filed in Court, or a statement on solemn affirmation filed in Court: subject to certain exemptions, viz., when required for the immediate purpose of being filed or used, in Court, or before an officer of a Court, or for the sole purpose of enabling any person to receive any pension or charitable allowance .. .. .

One rupee

(Impressed label)

In Bengal, Bombay, Assam, Malabar, Punjab, Bihar, C. P. & Berar, and U. P., two rupees—Subject to surcharge, if any. In Bombay the surcharge is 50%.

##### AGREEMENT OR MEMORANDUM OF AGREEMENT

(a) if concerning the sale of a bill of exchange .. .. .

Two annas, In Madras, Bihar, C. P. and Berar, U. P., three annas, and in Punjab, Burma, Bengal, four annas; in Bombay four annas (plus annas 2, surcharge.)

(Special adhesive stamp.)

(b) if concerning the sale of a Government security or share in an incorporated company or other body corporate .. .. .

Subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof of the value of the security or share.

In Bombay—a surcharge of 50%.

In Madras, Bihar, C. P. & Berar, U. P., the duty is : subject to a maximum of Rs. 15, one and half annas for every Rs. 10,000 or part thereof of the value of the security or share.

In Punjab, subject to a maximum of Rs. 15, two annas for every Rs. 10,000 or part thereof of the value of the security or share ;

In Burma, subject to a maximum of Rs. 20, two annas for every Rs. 10,000 or part thereof of the value of the security or share.

In Bengal, subject to a maximum of Rs. 20, two annas for every Rs. 10,000 or part if relating to sale of Government security ; and two annas for every Rs. 5,000 or part if relating to sale of share in a body corporate ; and in Bombay, subject to maximum of Rs. 20, two annas for every Rs. 10,000 or part, in case of Government Security, and in case of companies 2 annas for every Rs. 2,500 or part of the value of security at the time of the purchase or sale.

(Special adhesive stamp.)

(c) If not otherwise provided for, i.e., in the case of an agreement of a type other than those mentioned in (a) and (b) .. .. .

Eight annas.

In Madras, Bihar, C. P., and Berar, U. P., the duty is twelve annas.

In Punjab and Burma, one rupee. In Bombay, Rs. 1-8, i.e., Re. 1 + annas 8 surcharge.

Coloured impression or special adhesive stamp marked "agreement" ; or adhesive stamp if duty is one anna ; coloured impression if duty is two annas ; or special adhesive stamp marked "agreement".

#### AGREEMENT OF APPRENTICESHIP

Five rupees. (In Bombay add 50% surcharge.)

(Stamp paper).

In Madras, Bihar, C. P. and Berar, Burma, U. P., seven rupees and eight annas.

In Bombay and Bengal, ten rupees In Bombay Rs. 15, i.e., Rs. 10 (+ Rs. 5 surcharge.)

(Impressed Label.)

#### AGREEMENT RELATING TO DEPOSIT OF TITLE DEEDS, PAWN, OR PLEDGE, that is to say, any instrument evidencing an agreement relating to:—

(1) the deposit of title-deeds or instruments constituting or being evidence of the title to any property whatever (other than a marketable security), or

(2) the pawn, or pledge of movable property, where such deposit, pawn, or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt :—

- (a) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement ;
- (b) if such loan or debt is repayable not more than three months from the date of such instrument.

#### APPRAISEMENT OR VALUATION

(made otherwise than under an order of the Court in the course of a suit)

- (a) if the amount does not exceed Rs. 1,000 —

- (b) in any other case .. — — —

The same duty as a Bill of Exchange [No. 13 (b) ] for the amount secured.

Half the duty payable on a Bill of Exchange [No. 13 (b)] for the amount secured.

Same duty as in a Bond.

(See under "Bond ")

In Bengal, Madras and Punjab, the same duty as a bottomry bond.

Rupees five.

(Stamp Paper)

In Madras, Bihar, C. P., and Berar, Burma, U. P., Rs. 7/8 ;

and in Bengal and Punjab, ten rupees.  
In Bombay fifteen rupees, *i.e.*,  
Rs. 10 + (Rs. 5 surcharge.)

#### ARTICLES OF ASSOCIATION

(Where the Company is not for profit and is registered according to the provisions of Section 26 of the Indian Companies Act, 1913, as amended, no stamp duty is required.)

Twenty-five rupees.

But in Madras, C. P. & Berar, U. P. and Bihar, the duty is fifty rupees.

In Bombay and Burma, the duty is :—

- (a) Where the Company has no share capital or where its nominal share capital does not exceed Rs. 2,500, Rs. 25.

In Bombay, add 50% surcharge.

- (b) Where its nominal share capital exceeds Rs. 2,500, but does not exceed Rs. 100,000, Rs. 50 (In Bombay add 50% surcharge).

- (c) Where the nominal share capital exceeds Rs. 100,000, Rs. 100.  
But in Bombay Rs. 150, *i.e.*,  
Rs. 100 + Rs. 50 surcharge.

In Punjab, the duty is :—

- (a) Where the nominal capital does not exceed Rs. 100,000..... Rs. 25.

- (b) In other cases.....Rs. 50.

In Bengal and Assam the duty is :—

- (a) Where the nominal share capital does not exceed Rs. 100,000.... Rs. 50.

- (b) Where the nominal share capital exceeds Rs. 100,000....Rs. 100

**ASSIGNMENT**

See under 'Conveyance'.

**AWARD**

(a) where the amount or value of the property to which the award relates does not exceed Rs. 1,000:

Imperial and in Bengal, Punjab, Assam, C. P. and U. P.—the same duty as a Bond for such amount.

In Madras the same duty as a bottomry bond.

In Bombay, the same duty as a bond, subject to a maximum of Rs. 20 (50% surcharge.)

(b) in any other case .. .. .

Imperial: Rupees Five.

In C. P. Rs. 7-8; In Punjab and Assam, if it exceeds Rs. 1,000, but does not exceed Rs. 5,000, Rs. 7-8, and for every additional Rs. 1,000 or part thereof in excess of Rs. 5,000—annas eight, subject to a maximum of Rs. 50.

In Madras and Bengal, if it exceeds Rs. 1,000, but not Rs. 5,000—Rs. 10, and for every additional Rs. 1,000 or part thereof in excess of Rs. 5,000—8 annas, subject to a maximum of Rs. 20; in U. P. if it exceeds Rs. 1,000 but not Rs. 5,000, Rs. 7-8.

**Exemptions :**

Awards under the Bombay District Municipal Act or the Bombay Hereditary Offices Act is exempted.

**BILL OF EXCHANGE**

Bill of Exchange as defined by section 2, (2) and (3) not being a Bond, Bank note or Currency note—where payable otherwise than on demand, but not more than one year after date or sight if the amount of the bill or note does not exceed Rs. 200 .. .. .

If it exceeds

Rs.	200 and does not exceeds Rs.	400
" 400	" " " "	600
" 600	" " " "	800
" 800	" " " "	1 000
" 1,000	" " " "	1,200
" 1,200	" " " "	1,600
" 1,600	" " " "	2,000
" 2,500	" " " "	5,000
" 5,000	" " " "	7,500
" 7,500	" " " "	10,000
" 10,000	" " " "	15,000
" 15,000	" " " "	20,000
" 20,000	" " " "	25,000
" 25,000	" " " "	30,000

And for every additional Rs. 10,000 or part thereof in excess of Rs. 30,000

(b) Where payable in more than one year after date or sight .. .. .

If drawn single.	If drawn in set of two, for each part of the set.	If drawn in set of three, for each part of the set.
Rs. a. p.	Rs. a. p.	Rs. a. p.
0 3 0	0 2 0	0 1 0
0 6 0	0 3 0	0 2 0
0 9 0	0 5 0	0 3 0
0 12 0	0 6 0	0 4 0
0 15 0	0 8 0	0 5 0
1 2 0	0 9 0	0 6 0
1 8 0	0 12 0	0 8 0
2 4 0	1 2 0	0 12 0
4 8 0	2 4 0	1 8 0
6 12 0	3 6 0	2 4 0
9 0 0	4 8 0	3 0 0
13 8 0	6 12 0	4 8 0
18 0 0	9 0 0	6 0 0
22 8 0	11 4 0	7 8 0
27 0 0	13 8 0	9 0 0
9 0 0	4 8 0	3 0 0

The same duty as a bond (Art. 15) for the same amount.



**BILL OF LADING**

Four annas. In Bombay add 50 % surcharge.  
In Bengal, Madras and Burma, six annas ;  
and in Punjab, eight annas.  
(Stamp paper or impressed label.)

**BOND (NOT A DEBENTURE)**

where the amount of value secured  
by the bond does not exceed Rs. 10 ..  
where it exceeds Rs. 10, but not Rs. 50 ..  
where it exceeds Rs. 50, but not Rs. 100 ..

N.B.—In Bombay add 50% surcharge

two annas ;  
four annas ;  
eight annas ;  
(but in Bihar, ten annas).

where the amount or value secured by the bond  
exceeds Rs. 100, but not Rs. 200 ..

Re. 1 ; In Bombay add 50%.

where it exceeds Rs. 200, but not Rs. 300 ..

(In Madras, Bihar, Burma, Re. 1-4.)  
Re. 1-8 ;

(But in Bengal, Punjab and Madras, Rs. 1-14 ; and in Bihar and Burma, Rs. 2-4, and in U. P. Rs. 1-10). In Bombay, add 50%.

where the amount exceeds Rs. 300, but not Rs. 400

Rs. 2 ;

(In Bihar, Bengal, Burma, Rs. 3 ; in U. P. Rs. 2-4 ;) in Madras, C. P., Berar and Punjab, Rs. 2-8. In Bombay add 50% surcharge.

where it exceeds Rs. 400, but not Rs. 500 ..

Rs. 2-8 ;

(In Bihar, Burma and Bengal, Rs. 3-12 ;

In Bombay add 50% ;

in C. P. and Berar, Rs. 3-8 ;

in U. P. Rs. 2-14 ;

in Madras and Punjab, Rs. 3-2).

where it exceeds Rs. 500, but not Rs. 600 ..

Rs. 3 ;

(In Bengal, Punjab, Madras, Bihar, Burma, U. P., and Berar, Rs. 4-8.)

In Bombay Rs. 6-12,

Rs. 3-8 ;

where it exceeds Rs. 600, but not Rs. 700 ..

(In Bombay, Bengal, Madras, Punjab, Bihar, Burma, U. P., C. P., and Berar,

Rs. 5-4). In Bombay add 50 %.

where it exceeds Rs. 700, but not Rs. 800 ..

Rs. 4 ;

(In Bengal, Madras, Punjab, Bombay, Bihar, Burma, U. P., C. P. and Berar,

Rs. 6). In Bombay Rs. 9.

where it exceeds Rs. 800, but not Rs. 900 ..

Rs. 4-8 ;

(In Bengal, Madras, Punjab, Bombay, Bihar, Burma, U. P. and C. P. and Berar, Rs. 6-12). In Bombay add

50% surcharge.

where it exceeds Rs. 900, but not Rs. 1,000 ..

Rs. 5 ;

(In Bengal, Madras, Punjab, Bombay, Bihar, Burma, U. P., C. P., and Berar

Rs. 7-8). In Bombay 50% more.

And for every Rs. 500 or part thereof above  
Rs. 1,000 .. .. .

Rs. 2-8 ;

(In Bengal, Madras, Punjab, Bombay, Bihar, Burma, U. P., C. P., and Berar, Rs. 3-12). In Bombay add

50%.

**BOTTOMRY BOND i.e., BOND BY WHICH THE**

master of a ship borrows money on the security of the ship and the freight or cargo so that the ship may be preserved so as to reach her destination safe

Same as in a bond for the same amount  
(Stamp paper or impressed label.)

In Bombay add 50% surcharge.

But in Bengal, Assam, Madras and Punjab where amount or value secured							Rs. a. p.		
does not exceed Rs. 10	..	..	..	..	..	..	0	3	0
where it exceeds Rs. 10, but not Rs. 50	..	..	..	..	..	..	0	6	0
where it exceeds Rs. 50, but not Rs. 100	..	..	..	..	..	..	0	12	0
where it exceeds Rs. 100, but not Rs. 200	..	..	..	..	..	..	1	8	0
where it exceeds Rs. 200, but not Rs. 300	..	..	..	..	..	..	2	4	0
where it exceeds Rs. 300, but not Rs. 400	..	..	..	..	..	..	3	0	0
where it exceeds Rs. 400, but not Rs. 500	..	..	..	..	..	..	3	12	0
where it exceeds Rs. 500, but not Rs. 600	..	..	..	..	..	..	4	8	0
where it exceeds Rs. 600, but not Rs. 700	..	..	..	..	..	..	5	4	0
where it exceeds Rs. 700, but not Rs. 800	..	..	..	..	..	..	6	0	0
where it exceeds Rs. 800, but not Rs. 900	..	..	..	..	..	..	6	12	0
where it exceeds Rs. 900, but not Rs. 1,000	..	..	..	..	..	..	7	8	0
and for every Rs. 500 or part thereof in excess of Rs. 1,000	..	..	..	..	..	..	3	12	0

N.B.

**CANCELLATION OF ANY INSTRUMENT OR CONTRACT, IF ATTESTED.**

Rs. 5; In Bombay 50% surcharge.

(But in Bengal, Madras, Punjab, Burma and U. P. Rs. 7-8).

**CERTIFICATE OF SHARE, SCRIP OR STOCK**

As. 2; In Bombay add 50% surcharge (Adhesive stamp-revenue or coloured impression).

**CHARTERPARTY, i.e.,** a contract whereby a ship is let to a charterer .. .. .

Rs. 1; add 50%, in Bombay.

(But in Bengal, Madras, Bihar, C. P. and Berar, U. P., the stamp duty is two rupees.)

**COMPOSITION—DEED, i.e.,**

an instrument executed by a debtor by which he transfers his property for the benefit of his creditors, or by which payment of a composition or dividends on debts is secured to the creditors, or by which provision is made for the continuance of the debtor's business, under the supervision of inspectors or under license for the benefit of his creditors.

Rs. 10;  
(But in Punjab, U. P., Rs. 12-8 and in Bengal, Rs. 20; in Bombay Rs. 30 (with surcharge).)

**CONVEYANCE**

Where the amount or the value of the consideration shown in the deed of conveyance does not exceed Rs. 50;

Imperial, annas eight;  
But in Bengal, Assam,  
Punjab, Madras and Bihar, 12 annas,  
In C. P. and Berar, 8 annas,  
In Bombay, 8 annas + 4 annas surcharge.

Where the amount or the value of the consideration exceeds Rs. 50, but not Rs. 100 :—

Imperial Duty Re. 1.  
But in Bengal, Assam,  
Punjab, Madras and Bihar, Rs. 1-8;  
In other places, Re. 1.  
But in Bombay Re. 1-8 with surcharge.

Where the amount of consideration exceeds Rs. 100, but not Rs. 200 :—

In Bengal, Assam, Punjab, Madras and Bihar, Rs. 3; Elsewhere Rs. 2, but in Bombay add 50% surcharge.

Where the amount of consideration exceeds Rs. 200, but not Rs. 300 :—

In Bengal, Assam, Punjab,  
Madras and Bihar Rs. 4-8;  
In Burma also, Rs. 4-8;  
In U. P., Rs. 3-4;  
In C. P. and Berar Rs. 3-8.  
In Bombay Rs. 4-8 (+ 50% surcharge.)

Where the value or consideration exceeds Rs. 300  
but not Rs. 400 ;

In Bengal, Assam, Punjab, Madras,  
Bihar, and Burma, Rs. 6 ;  
In C. P. and Berar, Rs. 5-8 ;  
In U. P. Rs. 4-8 and Imperial Rs. 4.  
In Bombay, Rs. 9 (Rs. 6 + Rs. 3)

Where the value or consideration exceeds Rs. 400  
but not Rs. 500:

In C. P. and Berar, Bengal, Assam,  
Punjab, Bihar, Madras, and Burma,  
Rs. 7-8 ; In Bombay Rs. 7-8 + 50%  
surcharge.

In U. P. Rs. 5-12 ; and Imperial, Rs. 5.

Where the amount or consideration exceeds  
Rs. 500, but not Rs. 600 :—

Imperial, Rs. 6; but elsewhere, Rs. 9.  
In Bombay Rs. 9 + 50% surcharge.

Where the amount or consideration exceeds  
Rs. 600, but not Rs. 700 :—

Imperial, Rs. 7; elsewhere Rs. 10-8,  
add 50% surcharge.

Where the amount or consideration exceeds  
Rs. 700, but does not exceed Rs. 800 :—

Imperial Rs. 8; but elsewhere, Rs. 12.  
In Bombay add 50% surcharge.

Where the amount or consideration exceeds  
Rs. 800, but not Rs. 900 :—

Imperial Rs. 9; but elsewhere, Rs. 13.  
In Bombay add 50% surcharge.

Where the amount or value of consideration  
exceeds Rs. 900, but not Rs. 1,000.

Imperial, Rs. 10; elsewhere Rs. 15.  
In Bombay add 50% surcharge.

And for every Rs. 500 or part thereof in excess  
of Rs. 1,000 .. .. .

Imperial, Rs. 5; elsewhere, Rs. 7-8.  
In Bombay add 50% surcharge.

For Bombay city and urban areas there are special tables.

### CUSTOMS BOND

(a) where the amount does not exceed  
Rs. 1,000 ;  
n any other case,

Same duty as a Bond (See under  
" Bond ").

Rs. 5;

(But in Bengal, Madras, Punjab, Bombay,  
Burma, Bihar, C. P. and Berar, U. P.,  
ten rupees, if the amount exceeds  
Rs. 1,000). In Bombay add 50%  
surcharge.

If the amount does not exceed Rs. 1,000  
then, in Bengal, Punjab and Madras,  
the same duty as a Bottomry Bond.

### DEBENTURE

(whether with or without a mortgage) being  
a marketable security and transferable with or  
without a better title.

(a) by endorsement or by a deed or separate  
instrument of transfer .....

Impressed stamped label to be used.  
Imperial : Same duty as in a Bond for  
the same amount.  
Add 50% surcharge in Bombay.

In U. P., Burma, Bihar and in C. P.  
and in Bombay.....The same duty  
as in a Bond for the same amount.  
50% surcharge in Bombay.

And in Assam, Bengal, Punjab and  
Madras. The same duty as in Bot-  
tomry Bond for the same amount.

(b) by delivery .....

Explanation: The term 'Debenture' includes any interest coupon attached thereto, but in estimating the stamp duty the amount of such coupons shall not be included.

**EXEMPTION : A**

debenture issued by a registered (incorporated) Company or other corporation in terms of a registered mortgage-deed duly stamped in respect of the full amount of the debentures to be issued thereunder, whereby the Company or the body borrowing make over, wholly or partly, their property to trustees for the benefit of the debenture-holders provided the debentures so issued are expressed to be issued in terms of the said mortgage-deed.

**DELIVERY-ORDER IN RESPECT OF GOODS,**

i.e., an order or a document entitling a person named in it (or any person taking it as a transferee), or the bearer, of it, to obtain the delivery of any goods lying in any dock or port, or in a warehouse or upon a wharf.

**DEPOSITORS OF TITLE DEEDS :**

**FURTHER CHARGE,**

(a) When the original mortgage is one of the description referred to in clause (a) of article No. 40 (that is, with possession.)

(b) When such mortgage is one of the description referred to in clause (b) of article No. 40 (that is without possession.)

(i) if, at the time the instrument is executed, possession is given, or agreed to be given under such instrument

(ii) if possession is not so given .. ..

**INDEMNITY BOND**

**LETTER OF ALLOTMENT OF SHARES OR DEBENTURES**

**LETTER OF CREDIT, i.e.,**

an instrument by which one person authorizes another to give credit to the person in whose favour it is drawn.

**LETTER OF GUARANTEE**

**LETTER OF LICENSE, i.e., an**

agreement by a debtor with his creditors that the creditors shall, for a specified time, suspend their claims and shall allow the debtor to carry on his business at his own discretion.

Subject to any surcharge, the same duty as in a Conveyance for a consideration equal to the face amount of the debenture, but in U. P.:—

where the face amount does not exceed Rs. 100, Re. 1-4-0.

where the face amount exceeds Rs. 100. but not Rs. 200, Rs. 2-8-0 ;

where the face amount exceeds Rs. 200, the same duty as a Conveyance for a consideration equal to the face amount of the debenture ;

In Bombay city, and in Ahmedabad, Poona, and other city or cities notified, and in any urban area notified . . . the same duty as on a conveyance for a consideration equal to the face amount of the debenture.

[Make thorough inquiry about surcharge, if any.]

One anna. In Bombay 50% more surcharge.

See Agreement No : Deposit of title deeds

The same duty as Conveyance (No. 23) for a consideration equal to the amount of the further charge secured by the instrument.

The same duty as Conveyance (No. 23) for a consideration equal to the total amount of the charge less the duty already paid on the original mortgage and further charge.

The same duty as a Bond (No. 15) for the amount of the further charge.

Same duty as in a Security Bond.

(In Bombay 50% surcharge)

Two annas. In Bombay 3 annas. (Revenue stamp—Adhesive or Coloured Impression).

Two annas. (In Bombay add 50%). (Adhesive stamp or coloured impression)

See Agreement

Ten rupees. (In Bombay fifteen rupees with surcharge.)

**MEMORANDUM OF ASSOCIATION**

(a) when accompanied by articles of association ;

(b) if not accompanied by articles of association,

(i) where the nominal share capital does not exceed one lac of Rupees.

(ii) where the nominal share capital exceeds one lac of Rupees.

Explanation :—

Memorandum of Association of a corporation not for profit and registered under Section 26 of the Indian Companies Act, 1913, is exempted from stamp duty.

**MORTGAGE-DEED**, not being "an Agreement relating to Deposit of Title-deeds, Pawn or Pledge (No. 6)," Bottomry-Bond (No. 16), Mortgage of a Crop (No. 41) Respondentia-Bond (No. 56) or Security-Bond (No. 57) :

(a) when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given ;

(b) when possession is not given or agreed to be given as aforesaid ;

Explanation—A mortgagor who gives to the mortgagee a power-of attorney to collect rents or a lease of the Property mortgaged or part thereof is deemed to give possession within the meaning of this article ;

(c) when a collateral or auxiliary or additional or substituted security, or by way of further assurance for the abovementioned purpose, where the principal or primary security is duly stamped :—  
for every sum secured not exceeding Rs. 1,000  
and for every Rs. 1,000 or part thereof secured in excess of Rs. 1,000 .. .. .

**Exemptions :**

- (1) Instruments executed by persons taking advances under the Land Improvement Loans or Act, 1883, or the Agriculturists' Loans Act, 1884, or by their sureties as security for the repayment of such advances.
- (2) Letters of hypothecation accompanying a bill of exchange.

**NOTARIAL ACT**, that is to say, any instrument, endorsement, note, attestation, certificate, or entry not being a Protest (No. 50) made or signed by a Notary Public in the execution of the duties of his office, or by any other person lawfully acting as a Notary Public. .. .. .

An Impressed Label to be used.

Imperial : Rs. 15.

But in Bengal, Punjab, Madras, U. P. & Bihar, C. P. & Berar, Assam, the duty is Rs. 30. In Bombay the duty is Rs. 30 + Rs. 15 surcharge =Rs. 45.

In Bombay, Madras, Punjab, C. P. & Berar, U. P. & Bihar, the duty is Rs. 80, but in Bombay, add 50% surcharge.

In Assam and Bengal, Rs. 80.

In Assam and Bengal, Rs. 130.  
Imperial : Rs. 40.

The same duty as a Conveyance (No. 23) for a consideration equal to the amount secured by such deed.

The same duty as a Bond (No. 15) for the amount secured by such deed.  
Madras—The same duty as a Bottomry Bond (No. 16) for the amount secured by such deed.

Eight annas.

Eight annas.

In Bombay add 50% Surcharge.

One rupee.

50% Surcharge in Bombay.

**NOTE OF PROTEST BY MASTER OF A SHIP**

Eight annas.

But in Bengal, Madras, Bihar, U. P. and Burma, the stamp duty is one rupee. In Bombay one rupee and annas eight (with surcharge).

**NOTE OR MEMORANDUM sent by a Broker**

or Agent to his principal intimating the purchase or sale on account of such principal :—

- (a) of any goods exceeding in value twenty rupees      —      —      —      —      —
- (b) of any stock or marketable security exceeding in value twenty rupees.

Two annas.

Subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof of the value of the stock or security.

**NOTE OF PROTEST BY THE MASTER OF A SHIP**—Eight annas.

**ORDER FOR THE PAYMENT OF MONEY :—**

See Bill of Exchange (No. 13).

**PARTNERSHIP**

**A. INSTRUMENT OF :—**

Imperial : Rs. 2-8.

- (a) Where the capital of the partnership does not exceed Rs. 500.

But in Bengal, Madras, Assam, Rs. 5.  
In Bombay Rs. 5 plus Rs. 2-8 (Surcharge.)  
In U. P. Rs. 3-12. (Subject to surcharge.)

- (b) in any other case      —      —      —      —

Imperial Rs. 10: In Bengal Madras, Assam, Rs. 20. In Bombay Rs. 20 + Rs. 10. In U. P. where the Capital exceeds Rs. 500 but not Rs. 1,000, Rs. 7-8, and in any other case Rs. 15. (Subject to surcharge.)

**B. For Dissolution of Partnership**

Imperial Rs. 5.  
In Bengal, Madras, Assam, U. P. Rs. 10.  
In Bombay Rs. 10 + Rs. 5 (Surcharge.)

**PAWN OR PLEDGE**—See Agreement relating to DEPOSIT OF TITLE DEEDS, Pawn, or Pledge.

**POLICY OF INSURANCE**

*Sea-insurance* :—(1) "No contract for sea-insurance (other than such insurance as is referred to in section 506 of the Merchant Shipping Act, 1894) shall be valid unless the same is expressed in a sea-policy.

- (2) No sea-policy made for time shall be made for any time excludng twelve months.

(3) No sea-policy shall be valid unless it specifies the particular risk or adventure, or the time, for which it is made, the names of the subscribers or underwriters, and the amount or amounts insured.

(4) Where any sea-insurance is made for or upon a voyage and also for time, and to extend to or over any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy shall be charged with duty as a policy for or upon a voyage, and also with duty as a policy for time (S. 7).

	If drawn singly.	If drawn in duplicate, for each part.
<b>A.—Sea Insurance.</b>		
(1) for or upon any voyage—		
(i) where the premium or consideration does not exceed the rate of two annas or one-eighth percent of the amount insured by the policy ;	One anna.	Half-an-anna.

	If drawn singly.	If drawn in duplicate, for each part.
(ii) in any other case, in respect of every full sum of one thousand five hundred rupees and also any fractional part of one thousand five-hundred rupees insured by the policy	One anna.	Half-an-anna.
(2) for time—	— — — — —	— — — — —
(iii) in respect of every full sum of one thousand rupees and also any fractional part of one thousand rupees insured by the policy—		
where the insurance shall be made for any time not exceeding six months	Two annas.	One anna.
where the insurance shall be made for any time exceeding six months, and not exceeding twelve months	Four annas.	Two annas..
<b>B.—Fire Insurance and other classes of insurance</b> not elsewhere included in this Article, covering goods, merchandise, personal effects, crops, and other property against loss or damage—		
(1) in respect of an original policy—		
(i) when the sum insured does not exceed rupees five thousand	Eight annas.	
(ii) in any other case..	One rupee.	
(2) in respect of each receipt for any payment of a premium on any renewal of an original policy .. .. .	One half of the duty payable in respect of the original policy in addition to the amount, if any chargeable under No. 53.	
<b>C.—Accident and Sickness Insurance—</b>		
(a) against railway accident, valid for a single journey only..	One anna.	
<b>Exemption.—</b>		
When issued to a passenger travelling by the intermediate or third class in any railway—		
(b) in any other case—for the maximum amount which may become payable in the case of any single accident or sickness where such amount does not exceed rupees one thousand and also where such amount exceeds rupees one thousand for every rupees one thousand or part thereof .. .. .	Two annas.	
Provided that, in case of insurance against death by accident, when the annual premium payable does not exceed Rs. 2-8 as per Rs. 1000, the duty on every Rs. 1000 or part thereof of such instrument shall be one anna for maximum amount which may become payable under it.		
<b>C.—Insurance by way of indemnity</b> against liability to pay damages on account of <i>accidents to workmen</i> employed by or under the insurer or against liability to pay compensation under the Workmen's Compensation Act, 1923 for every Rs. 100 or part thereof payable as premium .. .. .	One anna.	One anna..
<b>D.—Life Insurance or other insurance</b> not specifically provided for, except such a Re-Insurance as is described in Division E of this Article—		
(i) For every sum insured not exceeding Rs. 250 ..	Two annas.	Two annas.

	If drawn singly	If drawn in duplicate, for each part
(ii) For every sum insured exceeding Rs. 250 but not exceeding Rs. 500 .. .. .	Four annas.	Three annas.
(iii) For every sum insured exceeding Rs. 500 but not exceeding Rs. 1,000 and also for every Rs. 1,000 or part thereof in excess of Rs. 1,000.	Six annas.	Four annas.
<p><i>Exemption</i> :—Policies of life insurance granted by the Director General of Post Office in accordance with rules for Postal Life Insurance issued under the authority of the Governor-General in Council.</p> <p>E.—Re-Insurance by an Insurance Company, which has granted a policy of the nature specified in Division A or Division B of this Article, by way of indemnity or guarantee against the payment on the original insurance of a certain part of the sum insured thereby.</p>		
	One quarter of the duty payable in respect of the original insurance, but not less than one anna or more than one rupee.	

*General Exemption* :—Letter of cover or engagement to issue a policy of insurance; Provided that unless such letter or engagement bears the stamp prescribed by this Act for such policy, nothing shall be claimable thereunder, nor shall it be available for any purpose, except to compel the delivery of the policy therein mentioned.

**POWER OF ATTORNEY**

One rupee.

(When empowering a person or persons to act in a single transaction).

In Bengal, Burma, Punjab, Re. 1.  
In Madras, Bihar, C. P. and Berar,  
U. P. twelve annas. In Bombay,  
Re. 1 + annas 8 surcharge.

When executed solely for registering a document or documents in relation to a single transaction or for admitting execution of one or more such documents.

Eight annas.

In Bengal, Burma, Punjab, Re. 1.  
In Madras, Bihar, C. P. and Berar,  
U. P. twelve annas. In Bombay add  
50% surcharge.

(When required in suits or proceedings under the Presidency Small Cause Courts Act, 1882).

Eight annas.

In Madras, Bihar, C. P. and Berar,  
Re. 1-8.

In Punjab, Bengal and Burma, Two  
rupees. In Bombay, Rs. 2 + Re. 1  
= Rs. 3.

(When empowering not more than five persons to act jointly and severally in more than one transaction or generally).

Five rupees.

In Madras, Bihar, C. P. and Berar and,  
U. P., Rs. 7-8.

In Bengal, Punjab, Burma Rs. 10. (In  
Bombay fifteen rupees.)

(When authorizing more than five persons, but not more than ten persons to act jointly and severally in more than one transaction or generally.)

Ten rupees.

In Madras, Bihar, C. P., and Berar, and  
U. P., Rs. 15.

In Punjab, Burma, Bengal, Rs. 20  
In Bombay add 50%.



(When given for consideration and authorizing the agent to sell any immovable property.)

(In any other case)

The same duty as in a conveyance.

Rupee one  
for each person authorised.

In Madras, Bihar, C. P. and Berar, U. P.  
Re. 1-8 for each person authorised.

In Punjab, Burma, Bengal, Rs. 2 for  
each person authorised. In Bombay  
Rs. 2 + Re. 1 = Rs. 3 (with surcharge.)  
for each person authorised.

#### PROMISSORY NOTES

(a) When payable on demand—

(i) When the amount or value does not exceed Rs. 250 .. .. .

(ii) When the amount or value exceeds Rs. 250  
but does not exceed Rs. 1000 .. .. .

(iii) In any other case .. .. .

(b) When payable otherwise than on demand ..

One anna.

Two annas.

Four annas.

The same duty as Bill of Exchange  
(Art. 13) for the same amount payable  
otherwise than on demand.

*Imperial Re. 1, Bombay Bengal, Madras  
Punjab, Assam and U. P. Rs. 2*

**PROTEST OF BILL OR NOTE** that is to say, any declaration in writing made by a Notary Public or other person lawfully acting as such, attesting the dishonour of a Bill of Exchange or Promissory Note.

**PROXY** empowering or authorising any person to vote at any one election of the members of a district or local board or of a body of Municipal commissioners, or at any one meeting of (a) members of an incorporated company or (b) a local authority or (c) proprietors, members or contributors to the funds of any institution.

Two annas.

In Bombay, annas 2 + anna 1 = 3 annas  
(i.e., with 50% surcharge).

**RECEIPT** for any sum of money or property the amount or value of which exceeds Rs. 20.

One anna Revenue.

#### SECURITY-BOND

(a) when the amount secured does not exceed Rs. 1,000

(b) in any other case.

The same duty as a bond for the amount secured; in Bombay 50% surcharge.

Five rupees.

(But in Madras, the same duty as in a Bottomry Bond, when the amount secured does not exceed Rs. 1,000).

In other cases, seven rupees and eight annas, in Madras, Punjab, Bihar, C. P. & Berar, Burma and U. P.

In Bengal the duty is ten rupees. In Bombay add 50% surcharge.

#### SHARE CERTIFICATE

Two annas  
In Bombay surcharge of one anna.

**SHARE WARRANT TO BEARER**

**IMPRESSED LABEL TO BE USED.**

In U. P. and Bihar, the duty is same as in a debenture transferable by delivery for a face amount equal to the nominal amount of the shares specified in the warrant.

Imperial duty: One and a half times the duty payable on a Conveyance (see Conveyance) for a consideration equal to the nominal amount of the shares shown in the warrant.

But it should be noted that the above provision does not apply to the city of Bombay and such other cities and urban areas as may be notified.

**EXEMPTIONS :—**

A Share Warrant when issued by a Company under the provisions of the Indian Companies Act, 1913, to have effect only upon payment, as composition for that duty to the Collector of Stamp Revenue, of

- (a) one and a half per cent. of the whole subscribed capital of the Company, or,
- (b) if any company which has paid the said duty or composition in full subsequently issues an addition to subscribed capital one and half per cent. of the additional capital so issued

**SHIPPING ORDER** for or regarding the Conveyance of goods on board a vessel.

One anna (revenue adhesive).

**TRANSFER OF SHARES OR DEBENTURES**

(Whether with or without consideration)  
Transfer of shares in an incorporated company or other corporation.

Subject to surcharge, if any:—

One-half the duty on a Conveyance for a consideration equal to the value of the share.

But in Bombay, twelve annas per every Rs. 100 or part thereof of the value of the share. (Add 50% surcharge.)

Transfer of debentures, being marketable securities whether the debenture itself is liable to duty or not.

One-half the duty on Conveyance for a consideration equal to the face amount of the debenture.

But in Bombay, twelve annas per every Rs. 100 or part thereof of the face amount of the debenture. (Surcharge 50%.)

In U. P. in the case of both i.e., whether transfer of shares or of debentures, the stamp duty is as follows :—

When the value of the share or the face amount of the debenture does not exceed Rs. 100, the stamp duty is :—

	Rs.	a.
	0	12
Where the same exceeds Rs. 100, but not Rs. 200, it is	1	8
Where the same exceeds Rs. 200, but not Rs. 300, it is	2	4
Where the same exceeds Rs. 300, but not Rs. 400, it is	3	0
Where the same exceeds Rs. 400, but not Rs. 500, it is	3	12
Where the same exceeds Rs. 500, but not Rs. 600, it is	4	8
Where the same exceeds Rs. 600, but not Rs. 700, it is	5	4
Where the same exceeds Rs. 700, but not Rs. 800, it is	6	0
Where the same exceeds Rs. 800, but not Rs. 900, it is	6	12
Where the same exceeds Rs. 900, but not Rs. 1000, it is	7	8
And for every Rs. 500 or part thereof over Rs. 1,000	3	12

**WARRANT FOR GOODS, i.e., an**

instrument recognising the right of any person (named in it) or persons taking as transferees from him, or of the holder of it, to the obtaining of property lying in or upon any dock, warehouse or wharf.

Four annas.

But in Madras, Punjab, Bihar C. P. and Berar, U. P. six annas.

In Burma and Bengal, eight annas. In Bombay 8 annas + 4 annas i.e., 12 annas with surcharge.

**REMISSION OF STAMP DUTY**

By notification dated 16th January, 1937, the Government has remitted stamp duty chargeable in the case of Conveyance and in the case of Transfer in the case of any instrument evidencing a transfer of property between Companies limited by shares under the Indian Companies Act 1913, in cases :—

(i) where at least 90 per cent. of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or

(ii) where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 per cent. of the issued share capital of the other, or

(iii) where the transfer takes place between two subsidiary companies of each of which not less than 90 per cent. of the share capital is in beneficial ownership of a common parent company :

Provided that in each case a certificate is obtained by the parties from the office appointed in this behalf by the Government concerned that the conditions above prescribed are fulfilled.

## **CHAPTER XXX**

### **LAW OF REGISTRATION**

The Law of Registration is given in the Indian Registration Act, 1908, which tells us what documents require compulsory registration, and in what cases is registration optional, and what the effects of non-registration are.

#### **The Raison D'être of Registration**

Registration facilitates the proving of facts, and saves so much of delay and expenditure which would otherwise have to be incurred. It provides a means of better safety and a preventive to fraud or other mischief. People know about the existence and execution of the document concerned. Especially in the case of real property (lands and buildings) a greater means of protection than in the case of movable property is required for the protection of innocent purchasers for value, acting in good faith. Supposing A wants to buy X's land. A must before going in for the purchase take care to find out whether X has really the title to the property, and whether the property is subject to any mortgage or other encumbrance. How could A find out the true facts, unless there is registration of such mortgages and encumbrances. Section 17 of the Registration Act renders a very important service in protecting the interests of innocent third parties by providing for compulsory registration in the case of interests in real property.

**Documents requiring Compulsory Registration under Sec. 17 of the Registration Act.**

**The following are the documents requiring compulsory registration :—**

- (1) Instruments of gift of immovable property ;
- (2) Non-testamentary instruments which create or purport to create, declare, assign, limit or extinguish, any right, title or interest of the value of one hundred rupees or upwards, to or in immovable property;
- (3) Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest ;
- (4) Leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent ; and
- (5) Non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property :

Provided that the Provincial Government may, by order published in the Official Gazette, exempt from registration any leases in districts the terms of which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

- (6) An authority to adopt.

The following documents, however, are not covered by points (2) and (3) of this (preceding) note, and, therefore, do not require registration :—

- (a) any composition deed ; or
- (b) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property ;

- (c) any debenture issued by any such Company and not creating, declaring assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or
- (d) any endorsement upon or transfer of any debenture by any such Company;
- (e) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, **but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest**; or
- (f) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding; or
- (g) any grant of immovable property by the Government;
- (h) any instrument of partition made by a Revenue Officer; or
- (i) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or
- (j) any order granting a loan under the Agriculturists Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or
- (k) any order made under the Charitable Endowments Act, 1890, vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or
- (l) any endorsement on a mortgage-deed acknowledging the payment of the whole or any portion of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or
- (m) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer.

#### **Documents of which Registration is optional [Sec. 18]**

Any of the following documents may (at the option of the parties) be registered under the Registration Act (with a view to obtaining safety and safeguarding against fraud, forgery or simulation) :—

- (1) Instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, or a value less than one hundred rupees, to or in immovable property;
- (2) Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;
- (3) Leases of immovable property for any term not exceeding one year, and leases exempted under section 17;
- (4) Instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in movable property;
- (5) Wills; and
- (6) All other documents not required by section 17 to be registered.

### Registration under other Acts

Where a document requires compulsory registration under other Acts, it must be registered as required under the other Act concerned. For example, a contract, out of natural love and affection, between parties in near relation, requires registration, if it is to be enforced, though without consideration. [Sec. 25 (1) of the Indian Contract Act.] Then registration is required, in some cases, under the Transfer of Property Act. Under the Indian Succession Act, where a person, having a nephew or a niece, gives by will any property in charity, the will must be deposited with the Registrar of Assurances; otherwise the charitable bequest under the will will be regarded as void, though the rest of the will is not prejudicial simply because it is not so deposited.

So also is registration of memorandum, articles, debentures, mortgages, charges etc., essential under the Companies Act.

### Effect of Registration

Under section 47 of the Indian Registration Act, a registered document operates from the time from which it would have commenced to operate if no registration thereof had been required or made, and not merely from the time of its registration. So the registration relates back to the date at which the document was executed; this applies both to documents which are compulsorily registrable, and documents which are optionally registrable. (*Lakshmandas v. Dasrat*, 1880, I. L. R. 6 Bom. 168, at p. 180.)

When there are two registered documents, the one which was executed at a prior date will have priority over the document registered at a later date. (*Lalubhai v. Bai Amrit*, 1877, I. L. R. 2 Bom. 299, at p. 343; *Naraian v. Laksman*, 1904, I. L. R. 29 Bom. 42, at p. 44; *Das V. Moolla*, 1916, 22 C. W. N. 318.) If two competing registered deeds or instruments are executed on the same day then the deed or the instrument executed first will have priority over the other. (*Lalubhai v. Bai Amrit*, 1877 I. L. R., 2 Bom. 299 at p. 344; *Muhammad Ewaz v. Birji Lall*, 1877, I. L. R., I All. 465 at p. 469; *Ratan Sahu v. Bishun Chand* 1907, 11 C. W. N. 732.)

### Effect of Non-registration of Document requiring Registration under the Indian Registration Act

Under section 49 of the Indian Registration Act, no document requiring registration under section 17, or by any provision of the transfer of Property Act, shall affect any immovable property comprised by the document, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power. But an unregistered document affecting immovable property and required by the Indian Registration Act or under the Transfer of Property Act, to be registered can be received as evidence of a contract in a suit for specific performance (under Chapter II of the Specific Relief Act), or as evidence of part-performance of a contract (for the purposes of section 53A of the Transfer of Property Act), or as evidence of any collateral transaction not required to be effected by registered instrument. Under section 50 of the registration Act certain registered documents relating to land have priority over and take effect against unregistered documents relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. But this provision does not apply to leases exempted under the proviso to sub-section (1) of Sec. (17) or to any document mentioned in sub-section (2) of Sec. (17), or to any registered document which had not priority under the law in force at commencement of the Indian Registration Act, 1908.

A registered document takes priority over an oral agreement or an oral declaration, unless, if the oral agreement or declaration had been made prior to the registered document, it (the oral agreement or declaration) had been followed or accompanied by delivery of possession so as to constitute a valid transfer.

## CHAPTER XXXI

### LAW OF LIMITATION

The Law of Limitation is given in the Indian Limitation Act of 1908, which tells us what limitation is, when limitation starts, and the different periods of limitation with regard to different types of actions at law.

#### Meaning of "Limitation"

By "limitation" is meant the period of time allowed by the law within which a legal remedy for the infringement of a right must, if at all, be taken in a Court of law. Once the period gets over the remedy becomes time-barred.

#### Meaning of "Prescription"

By "prescription" we mean the period of time, fixed under the law, on the expiration of which a right is acquired or extinguished. By prescription a legal right is created or extinguished.

#### The Raison d'être of Limitation

The law of limitation is not, as might be supposed, a dishonest law. The sword of Democles should not be hanging all the time over the head of a party to a legal transaction. If A owes B a sum of money, and if A default's in repaying the same, B should have his remedy by a suit against A for recovery of the same, unless he forgoes the money. But B cannot all the time rest lethargically, and then spring up at his convenience to enforce his claim against A. A person wishing to have his legal right enforced at law must do so within a reasonable time **allowed under the Limitation Act**, because otherwise A would be compelled to lock up with him indefinitely the amount of the debt; moreover he would be required to keep well protected all the receipts, vouchers, documents etc., for an inconveniently long a period of time, and he might have parted with, lost or misplaced any important document helpful to his defence.

Hence the law **does not allow lethargy**. Once the period of limitation has lapsed, the debt can be said to have become time-barred, or the right or the remedy lost. The Latin maxim is: *Vigilantibus, et non dormientibus, lex succurrit*, i.e., the vigilant, and not the dormant, the law helps.

#### Effect of Limitation

Once the period of time fixed by the law has expired no suit or legal proceeding in a Court of law can be brought against the other party, because the remedy is barred. If a suit is so brought, the Court has got to dismiss it. The Court cannot go into the merits of it at all. The suit will be dismissed on a preliminary objection by Counsel for the defendant.

#### Computing Limitation

When the plaintiff is under a legal disability the period of limitation **shall begin to run only from the time such disability ceases**. Examples of such disability are: minority, insanity. In case the disability continues till death, the legal representatives may sue within the same period after the death as would otherwise have been according to the period of limitation. And the same rule applies in the case of the disability of the legal representative himself (section 6 of the Limitation Act). Under section 5 of the Act the period of limitation may be extended for appeals, and applications, if sufficient cause is shown in that respect.

In the case of a holiday being the day on which the period of limitation expires, that day shall not be counted. Section 7 of the Act gives relief where one of several

persons jointly entitled to take legal proceedings is under a legal disability. In such a case, if a discharge can be given without the concurrence of such person, limitation will run against them all; when, however, such discharge cannot be given, time will not run against any of them till any one of them can give such discharge without the concurrence of the rest or until the disability is over.

In computing the period of limitation we must **exclude the day from which such period is to be computed**. In computing the period of limitation with respect to an appeal, or an application for leave to appeal, or for review of judgment, the day on which the judgment sought to be appealed against was passed, and the time taken up for obtaining a copy of the judgment or decree or order, must be excluded

A very important and protective provision is made by section 18 of the Indian Limitation Act; that section provides that where a person having a right to sue or to make an application is prevented from doing so because of want of knowledge of his right, **such want of knowledge having been caused by fraud on him, the period of limitation will be computed from the time the fraud first became known to him**. Similarly when a person has been prevented from suing or applying in a Court of law, by reason of the fraudulent concealment from him of a document essential to prove his right in a Court of law, the period of limitation shall be computed from the time he first became able to produce the document or to compel its production.

Under section 13, the period of time during which the person was out of India is to be taken out of calculation. Under section 14, the time during which legal proceedings in some other Court were bona fide pursued, erroneously, or without the Court having the necessary jurisdiction, is not to be calculated; nor the time during which the court has stayed the proceedings (Sec. 15). Section 19 of the Indian Limitation Act provides that when before the expiration of the period prescribed for a suit or application, with regard to any property or right, the party who is liable, signs an **acknowledgment of liability** regarding such property or right, or where a person through whom he has derived title or liability acknowledges in writing the liability in respect of such property or right **a fresh period of limitation will start from the date the acknowledgment in writing was so signed**. If the writing whereby the acknowledgment was made does not bear any date thereon, oral evidence can be given to prove the date at which it was signed.

Sections 20 and 21 of the Indian Limitation Act, provide that where, before the expiry of the prescribed period, **interest is paid on the debt or the legacy, or where a portion of the principle is paid up**, by the debtor or by his duly-authorized agent, **a fresh period of limitation shall run from the time payment was made**.

Where, in the case of a mortgage the mortgagee is in possession of the mortgaged property, **the receipt of any rents or the yields of the property shall be considered a payment, with the result that a fresh period of limitation shall run from the date of such payment**.

### Different Periods of Limitation

For different types of remedies there are different periods of limitation. For example, in the case of contracts which are registered, the period of limitation is six years from the date the cause of action arose. For contracts—oral or written—which are not registered the period of limitation is three years, from the time the cause of action arose. A period of six years is, as a rule, provided for suits for which no provision is made in the Limitation Act [Article 120 of the Limitation Act] Article 120 is therefore known as the omnibus or residuary article.



## NOW FOLLOWS A LIST OF THE DIFFERENT PERIODS OF LIMITATION

## PERIODS OF LIMITATION

Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
7	For the wages of a household servant, artisan, or labourer.	One year ..	When the wages accrue due.
8	For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	One year ..	When the food or drink is delivered.
9	For the price of lodging .. ..	One year ..	When the price becomes payable.
10	To enforce a right of pre-emption, whether the right is founded on Law, or general usage, or on special contract.	One year ..	When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where there is no physical possession possible when the sale is registered.
16	Against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue, or on account of demands recoverable as such arrears.	One year ..	When the payment is made.
27	For compensation for inducing a person to break a contract with the plaintiff.	One year ..	The date of the breach.
30	Against a carrier for compensation for losing or injuring goods.	One year ..	When the loss or injury occurs.
31	Against a carrier for compensation for non-delivery of, or delay in delivering, goods.	One year ..	When the goods ought to be delivered.
32	Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two years ..	When the perversion first becomes known to the person injured thereby.
46	By a party bound by award to recover property comprised in it.	Three years ..	The date of the final award or award in the case.
48	For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.	Three years ..	When the person having the right to the possession of the property first learns in whose possession it is.
48A	To recover movable property conveyed or bequeathed in trust, deposited or pawned and afterwards bought from the trustee, depository or pawnee for a valuable consideration.	Three years ..	When the sale becomes known to the Plaintiff.
48B	To set aside sale of movable property, comprised in a Hindu, Mahomedan or Buddhist religious or charitable endowment, made by a manager thereof for valuable consideration.	Three years ..	When the sale becomes known to the Plaintiff.

Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
49	For other specific movable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Three years ..	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.
50	For the hire of animals, vehicles, boats, or household furniture.	Three years ..	When the hire becomes payable.
51	For the balance of money advanced in payment of goods to be delivered.	Three years ..	When the goods ought to be delivered.
52	For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Three years ..	The date of the delivery of the goods.
53	For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years ..	When the period of credit expires.
54	For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Three years ..	When the period of the proposed bill elapses.
55	For price of trees or growing crops when no fixed period of credit has been allowed.	Three years	From the date of the sale
56	For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years ..	When the work is done.
57	For money payable for money lent.	Three years ..	When the loan is made.
58	Like suit when the lender has given a cheque for the money.	Three years ..	When the cheque is paid.
59	For money lent under an agreement that it shall be payable on demand.	Three years ..	When the loan is made.
60	For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable.	Three years ..	When the demand is made.
61	For money payable to the plaintiff for money paid for the defendant.	Three years ..	When the money is paid.
62	For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years ..	When the money is received.
63	For money payable for interest upon money due from the defendant to the plaintiff.	Three years ..	When the interest becomes due.
64	For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years ..	When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time and then when that time arrives.

Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
65	For compensation, for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years ..	When the time specified arrives or the contingency happens.
66	On a single bond, where a day is specified for payment.	Three years ..	The day so specified.
67	On a single bond, where no such day is specified.	Three years ..	The date of executing the bond.
68	On a bond subject to a condition.	Three years ..	When the condition is broken.
69	On a bill of exchange or promissory note payable at a fixed time after date.	Three years ..	When the bill or note falls due.
70	On a bill of exchange payable at sight or after sight, but not at a fixed time.	Three years ..	When the bill is presented.
71	On a bill of exchange accepted payable at a particular place.	Three years ..	When the bill is presented at that place.
72	On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years ..	When the fixed time expires.
73	On a bill of exchange not accompanied by any writing restraining or postponing the right to sue.	Three years ..	The date of the bill.
74	On a promissory note or bond payable by instalments.	Three years ..	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.
75	On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years ..	When the default is made unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.
76	On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years ..	The date of the delivery to the payee.
77	On a dishonoured foreign bill where protest has been made and notice given.	Three years ..	When the notice is given.
78	By the payee against the drawer of a bill of exchange, which has been dishonoured by non-acceptance.	Three years ..	The date of the refusal to accept.
79	By the acceptor of an accommodation-bill against the drawer.	Three years ..	When the acceptor pays the amount of the bill.
80	Suit on a bill of exchange, promissory note, or bond not herein expressly provided for.	Three years ..	When the bill, note, or bond becomes payable.

Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
81	By a surety against the principal debtor.	Three years ..	When the surety pays the creditor.
82	By a surety against a co-surety.	Three years ..	When the surety pays anything in excess of his own share.
83	Upon any other contract to indemnify.	Three years ..	When the plaintiff is actually indemnified.
84	By a Vakil or Solicitor for his costs in a suit or for work done, when there is no express agreement as to the time of payment of such costs.	Three years ..	Date of completion of the work or of proper discontinuance of the work.
85	For the balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties.	Three years ..	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.
86 (a)	On a policy of insurance, when the sum assured is payable after proof of the death has been given to or received by the insurers.	Three years ..	The date of the death of the deceased.
(b)	On a policy of insurance, when the sum insured is payable after proof of the loss has been given to or received by the insurers.	Three years ..	The date of the occurrence causing the loss.
87	By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three years ..	When the insurers elect to avoid the policy.
88	Against a factor for an account.	Three years ..	When the account is, during the continuance of the agency, demanded and refused, or, where no such demand is made, when the agency terminates.
89	By a principal against his agent for movable property received by the latter and not accounted for.	Three years ..	When the account during the continuance of the agency, is demanded and refused or where no such demand is made, when the agency terminates.
90	Other suits by principals against agents for neglect or misconduct.	Three years ..	When the neglect or misconduct becomes known to the plaintiff.
91	To cancel or set aside an instrument not otherwise provided for.	Three years ..	When the facts entitling cancellation or setting aside of the instrument become known to him.
92	To declare the forgery of an instrument issued or registered.	Three years ..	When the plaintiff comes to know of the issue or registration of the instrument.
93	To declare the forgery of an instrument attempted to be enforced against the plaintiff.	Three years ..	The date of such attempt.

Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
94	For property conveyed by the plaintiff while insane.	Three years	.. When the plaintiff becomes sane and comes to know of the conveyance.
95	To set aside a decree obtained by fraud, or for other relief on the ground of fraud.	Three years	.. From the time the fraud comes to be known.
96	For relief on the ground of mistake.	Three years	.. When the mistake becomes known to the Plaintiff.
97	For money paid upon an existing consideration which afterwards fails.	Three years	.. The date of the failure.
98	To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years	.. The date of the trustee's death, or if the loss has not then resulted, the date of the loss.
100	By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three years	.. When the right to contribution accrues.
101	For a seaman's wages.	Three years	.. The end of the voyage during which the wages are earned.
102	For wages not otherwise expressly provided for by this Schedule.	Three years	.. When the wages accrue due.
105	By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee.	Three years	.. When the mortgagor re-enters on the mortgaged property.
106	For an account and a share of the profits of a dissolved partnership.	Three years	.. The date of the dissolution
110	For arrears of rent.	Three years	.. When the arrears become due.
112	For a call by a company registered under any Statute or Act.	Three years	.. When the call is payable.
113	For specific performance of a contract.	Three years	.. The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.
114	For the rescission of a contract.	Three years	.. When the facts entitling the plaintiff to have the contract rescinded first become known to him.
115	For compensation for the breach of any contract, express or implied, not in writing registered, and not herein specially provided for.	Three years	.. When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
116	For compensation for the breach of a contract in writing registered.	Six years	.. When the period of limitation would begin to run against a suit brought on a similar contract not registered.

Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
120	Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years ..	When the right to sue accrues.
132	To enforce payment of money charged upon immovable property.  Explanation.—For the purposes of this article, (a) allowances and fees respectively, called malikana and haqqs and (b) the value of any agricultural or other produce, the right to receive which is secured by a charge upon immovable property and (c) advances secured by mortgage by deposit of title deeds, shall be deemed to be money charged upon immovable property.	Twelve years ..	When the money sued for becomes due.
134 (c)	By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of movable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years ..	The death, resignation or removal of the seller.
145	Against a depository or pawnee to recover movable property deposited or pawned.	Thirty years ..	The date of the deposit or pawn.
147	By a mortgagee for foreclosure or sale.	Sixty years ..	When the money secured by the mortgage becomes due.
148	Against a mortgagee to redeem or to recover possession of immovable property mortgaged.	Sixty years ..	When the right to redeem or to recover possession accrues.  Provided that all claims to redeem arising under instruments of mortgage of immovable property situate in Lower Burma which had been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.



## **CHAPTER XXXII**

# **COMPANY LAW**

### **Meaning of 'Company'**

In a wide sense, a 'Company' means an association of individuals formed for some purpose. (Smith v. Anderson, 1880, 15 Ch. D. 247.) In the strictly limited sense (as understood under the Indian Companies Act) a Company means an association of individuals formed for some purpose **and** registered under the present Indian Companies Act or an earlier Indian Companies Act.

### **'Company' distinguished from 'Firm'**

Please see pages 175, 176, Chapter XX.

### **Classification of Companies under the Indian Companies Act**

Companies are limited and unlimited. Limited Companies may be limited by shares or by guarantee or by both. And we have public and private companies ; and holding and subsidiary companies. Further, companies may be banking or non-banking ; and we have insurance companies, investment companies, trading companies and non-trading companies

#### **Companies limited by Shares**

A Company is called one limited by shares when the liability of its members is limited to the amount remaining unpaid on the share or shares held by them.

#### **Companies limited by Guarantee**

These are Companies in which each member is liable, in the event of liquidation, to pay a specified sum of money, as mentioned in the Memorandum of Association, as his contribution towards the debts, assets and liabilities of the Company.

#### **'Holding' and 'Subsidiary' Companies**

When a Company is such that it holds more than fifty per cent. of the share capital of another Company, or has got the power to appoint the majority of Directors of another Company, or has got more than fifty per cent. of voting power in another Company, it is called a Holding Company, and that other Company is called a Subsidiary Company.

#### **Companies incorporated by Royal Charter or Letters Patent**

These are Companies in which the Charter governs and defines the objects and activities of the concern. Any contract in excess of the Charter, though ultra vires, is nevertheless enforceable. The only penalty may be that the Crown may annul the Charter.

#### **Companies incorporated by Special Act of the Legislature**

Sometimes Companies are formed under special Acts of the Legislature, the idea being that of giving such concerns **special** powers, in the absence of which they may be ordered to be wound up on the ground that the carrying on of their activities involves substantial nuisance. The Special Act under which such a Company is constituted describes the scope of its activities. Any contract or act in excess of the powers given it under the Special Act will be regarded as ultra vires and cannot be enforced. Companies like Railway, Tramway, Gas and Electric Companies, have been formed under Special Acts with a view to being equipped with **'special'** or **'compulsory'** powers.



### 'Public' and 'Private' Companies

A Private Company is one in which its Articles of Association contain the following restrictions :—

- (1) That the number of its members shall not exceed 50, excluding, of course, the nominees and employees of the Company, and so that joint holders of shares in it shall be treated as single holders ;
- (2) That it shall make no invitation to the members of the public for shares or debentures ;
- (3) That there shall be some restriction with regard to the right of its members to transfer the shares held by them in it.

Any Company which does not contain the abovementioned restrictions in its Articles is regarded as a Public Company.

### 'Family Companies' — 'One Man Companies'

One person may hold a majority of the shares in a Company which he forms, and may take only one other person with him so as to constitute the minimum number required in a Private Company, or six others so as to constitute the required seven in a Public Company. A Company so formed by that person can be regarded as a one-man Company ; and if he takes members of his own family with him, the Company may be called a Family Company. Even in such a case, the Company is regarded as a distinct legal entity, existing separate from the person who formed it and the other persons who are members in it. This is the rule in *Salomon v. Salomon & Co. Ltd.*, 1897 A.C. 22.

### Prohibition of large Unregistered Firms

#### 'Illegal' Associations

**Excepting the case of a Hindu Joint Family**, an association of persons doing banking business and containing more than ten members, or doing a non-banking business and containing more than twenty persons, is regarded as an **"illegal" association, if it is formed for the acquisition of gain**, unless it is registered under some Companies Act or is formed by a Special Act or by Royal Charter. This provision of the Companies Act prohibits large partnerships, and is based on the idea that the mischief that may otherwise result, and the inconvenience or hardship that may be caused by having too many persons in a business involving unlimited liability, should be prevented.

Where a business is for **charity alone**, it may have more than 20 persons. Similarly, **a trade combination or pool** may have more than 20 persons, because it is not formed for the acquisition of gain or the doing of any business, but only for a purpose which is beneficial to those who are members of it, e.g., to prevent unfair competition or to procure harmonious trade relations or business dealings among those who are members of it. (*New Mofussil Co. v. Rustomji*, 38 Bom. L.R. 408.)

The consequences of forming such an illegal association are serious indeed to its members. Such an association gets **no recognition at law**, and it **cannot sue any outsider who has dealt with it**. So also, **the members of the association cannot sue the association or the other members** for the satisfaction of any right **accruing out of the activities of the illegal association**. (*Pannaji v. Sanaji*, 1930, P.C. 300.) The **only relief** that can be had **by a member** against the illegal association is for the recovery of any sum of money **he originally contributed** to the association, provided the money has not already been used up by the illegal association in its business ; but no suit can lie for the recovery of any share of the profits of the illegal association. (*Greenberg v. Cooperstein*, 1926, 1 Ch. 667.) Such an association **cannot be dissolved** because there is nothing to dissolve. (*Mewa Ram v. Ram Gopal*, 1926, 48 All. 735.)

Each member of the "illegal" association is liable to an unlimited extent for all the debts and liabilities of the association to any outsider by whom a suit **can be brought** ; besides each member is liable to a fine which may extend to Rs. 1,000.

The mere fact that the number of the members of the originally illegal association gets diminished to twenty or less does not make the association recognisable at law ; it **remains illegal till it gets registered**. (U. Sein Po v. U. Phyu, 7 Rang. 540.)

An unregistered association is liable to income-tax on profits earned by it. (Gopalji Co. v. Commissioner of Income-tax, 1931, Lah. 376.)

A **foreign company not formed in this country** but doing business here **does not require registration**, because the prohibition does not apply to Companies formed outside India. (Bateman's Case, 1881, 6 App. Cas. 386.)

### Formation of Companies

A Company may be formed as a Private Company by the registration, with the Registrar of Companies (of the State concerned), of the following documents :—

- (1) **The Memorandum of Association**, i.e., the document showing the name of the Company and its characteristics, viz., whether it is limited or unlimited, its objects, the share capital, if any, and the number of shares into which it is divided, and the State in which it is registered ;
- (2) **The Articles of Association**, which must compulsorily be registered if the Company is unlimited or limited by guarantee, but which need not be registered if the Company is limited by shares alone ;
- (3) **A Declaration of Compliance**, duly signed by an Advocate, Attorney or Pleader, or by a Director, Manager, or Secretary, of the Company, to the effect that the requirements of the Companies Act with regard to the registration of the Company have been duly satisfied, except the payment of fees under Table B.

A Company may be formed as a Public Company by registration of the three documents mentioned above in the case of Private Companies, and the following additional documents :—

- (a) A list of persons who have consented to be the Directors of the Company ; and
- (b) The consent of the Directors to act as such.

When a Public Company is formed with a share capital, each Director or proposed Director must have signed the Memorandum for the number of shares not less than what he is, under the Articles, required to take in order to qualify himself as a Director, or he must have taken from the Company or paid or agreed to pay for those shares, or must have signed and filed with the Registrar a consent in writing to take and pay for his qualification shares, or must have filed with the Registrar an affidavit to that effect.

Whether the Company is registered as a public Company or as a private Company, the Articles of Association need not be registered if the Company is limited by shares alone. Table A, however, will apply in the case of a public Company. It is for this reason that Companies always have their own Articles, and have them filed with the Registrar. Supposing a Private Company is formed and the Articles are not registered. Table A cannot automatically apply in such a case, because nowhere in Table A are found the necessary restrictions relating to Private Companies. The result would be that a Private Company would be indirectly obliged to file its own Articles, or to incorporate Table A with the necessary restrictions. It is otherwise in the case of a Public Company, where no restrictions are required.

### Certificate of Incorporation

#### Consequences of the Registration of a Company

When a Company is registered, the Registrar of Companies issues a Certificate called the **Certificate of Incorporation**. That certificate is **conclusive evidence** that all the

requirements of the Act regarding the registration of the Company concerned have been satisfied. No other or further evidence is admissible in such a case. So even if one man has forged six other signatures on the Memorandum, the Certificate given by the Registrar cannot be challenged and the Company's existence cannot be broken. (*Oakes v. Turquand*, 1867, L.R. 2 H.L. 325 ; *Moosa Ariff v. Ebrahim Ariff*, 40 Cal. 1.)

Another important consequence of the registration of a Company is that a legal entity, with an existence (till dissolution), with a Common Seal, is brought into existence.

The Memorandum of Association which is registered as a condition precedent to the formation of a Company, describes the scope of its powers and the limits of its activities. Anything which is in excess of its powers would be regarded as ultra vires and void. (*Ashbury Railway Co. v. Riche*, 1875, 7 H.L. 653.)

Another important consequence is that, as between the Company and its members, the Memorandum forms a contract as if every member, his heir, successor, assign, executor or administrator, had signed the Memorandum. The Memorandum also describes the domicile and nationality of the Company and its character or nature. The Memorandum is open to public inspection so that every person dealing with the Company is deemed to have constructive or implied notice of the contents of the Memorandum. (*Mahony v. East Holyford Mining Co.*, 1875, 7 H.L. 869.)

### Form of List of Persons Consenting to be Directors

The form is given in the Schedule to the Indian Companies Rules, 1941, as follows :—

List of Persons Consenting to be Directors

THE INDIAN COMPANIES ACT, 1913

[See Section 84]

Filing fee Rs.

Name of Company .....

List of the persons who have consented to be Directors of the .....  
to be filed with the Registrar Pursuant to section 84 (2).

Presented for filing by .....

To the Registrar of Joint Stock Companies .....

I/We, the undersigned, hereby give you notice, pursuant to section 84(2) of the Indian Companies Act, 1913, that the following persons have consented to be Directors of the....

NAME	Address	Description

Signature, address and description  
of applicant for registration.

Dated this ..... day of ..... 19 .....

**Form of Consent of Directors to Act**

The form is given in the Schedule to the Indian Companies Rules, 1941, as follows :—

Consent of Director to act.

**THE INDIAN COMPANIES ACT, 1913**

[See Section 84]

Filing fee Rs. 3.

Name of Company .....  
 Consent to act as Director /Directors of the .....  
 to be signed and filed pursuant to section 84 (1) (i) .....  
 Presented for filing by .....  
 To the Registrar of Joint Stock Companies .....  
 I/We, the undersigned, hereby testify my/our consent to act as Director/Directors of the .....  
 pursuant to section 84 (1) (i) of the Indian Companies Act, 1913.

Signature	Address	Description

Dated this.....day of.....19 .....

**Form of Declaration by Advocate, Attorney or Pleader, or by Director, Manager or Secretary of The Company, to the effect that the Requirements of the Act, regard to Registration, have been complied with.** The form is given in the schedule to the Indian Companies Rules, 1941, as follows :—

Filing Fee Rs. 3.

Name of Company.....

Declaration of compliance with the requirements of the Indian Companies Act, 1913, made pursuant to section 24 (2) on behalf of a Company proposed to be registered as the....

Presented for filing by .....  
 I.....of .....  
 do solemnly and sincerely declare that I am an Advocate/Attorney/a Pleader, entitled to appear before a High Court, who is engaged in the formation of the Company/a person named in the Articles as a Director/Manager/Secretary of the.....  
 .....and that all the requirements of the Indian Companies Act, 1913, in respect of matters precedent to the registration of the said Company and incidental thereto, have been complied with, save only the payment of the fees and sums payable on registration. And I make this solemn declaration conscientiously believing the same to be true.

**Note :—**The declaration need not be either—

- (a) signed before a Magistrate or an Officer competent to administer oaths, or
- (b) stamped as an affidavit.

### Name which a Company may adopt

A Company cannot take the name of, or a name similar to the name of, an existing Company, unless the existing Company is in the course of a winding up and consents (in the manner required by the Registrar) to the use of the identical or similar name by the would-be Company. In *Asiatic Government Security Life Insurance Co. Ltd. v. The New Asiatic Insurance Company Ltd.*, 1939, Comp. Cas. 208, the Plaintiff Company sought to obtain an injunction against the Defendant Company, restraining it from having in its name the word 'Asiatic', on the ground that it caused confusion and could deceive the public. But the Court, refusing to grant the injunction, held that the Defendant Company had taken in its name the word "New", and had dropped the word "Government" as also the word "Life", and thus had sufficiently distinguished itself from the Plaintiff Company. Where, through inadvertence, a new Company adopts a name same as or similar to that of an existing Company, it may with the consent of the Registrar adopt some other name.

Except with the previous consent in writing of the Government, a Company cannot take in its name any word suggesting patronage of the Government, or of any Public Authority. Thus, it cannot include in its name, without such consent, words such as: "Crown"; "Emperor"; "Empire"; "Empress"; "King"; "Queen"; "Royal"; "State"; "Federal"; "Reserve Bank"; "Imperial Bank"; "Municipal"; "Chartered". If the Company is formed with limited liability, it must have the word "Limited" as the last word in its name, unless it has been exempted by the State Government from having to use that word. Such exemption can only be given to a Company formed not for the distribution of gain, but for some charitable, benevolent or publicly useful purpose.

The Registrar of Companies of the State concerned may refuse to register the Company concerned if any of the abovementioned restrictions be not fulfilled. On the other hand, the Registrar cannot refuse to register a Company which has taken a name same as or similar to that of an existing Firm, because the Companies Act does not give the Registrar the power so to do. In such a case the proper remedy of the aggrieved party, i.e., the existing firm, would be to apply to the Court for an injunction against the Company.

### Commencement of Business by Company

A newly incorporated Company may commence its business immediately, **if it is a private company**; but a public company must procure from the Registrar of Companies a Certificate of Commencement of Business, before starting its business. Such Certificate would only be given if the following conditions are fulfilled:

- (1) Shares must have been allotted to an amount equal to or greater than the minimum subscription amount;
- (2) Every Director of the Company must have paid on the shares taken or agreed to be taken by him, a proportion equal to the proportion payable on application and allotment or if no prospectus is issued, the sums payable on the shares payable in cash;
- (3) If a prospectus has not been issued, a statement in lieu of prospectus must have been filed with the Registrar;
- (4) A duly verified declaration by a Director or Secretary of the Company must have been filed with the Registrar to the effect that the aforesaid conditions have been complied with.

### Certificate of Commencement Conclusive Evidence

The Certificate of Commencement of Business is conclusive evidence that all the requirements of the Act with regard to the Commencement of Business by the Company have been duly fulfilled.

### Registered Office of the Company

Every Company must have a Registered Office which determines the place at which correspondence and communications may be entered into, and which determines the nationality and domicile of the Company, as also the jurisdiction of the Court in Company matters.

### Memorandum of Association

A Memorandum of Association is the **principal** document of the Company ; it is its Charter, in a sense. It states what the name of the Company is, the State in which its Registered Office is situated, the objects for which the Company is formed and the compass of its activities. It says whether the Company shall have a share capital or not, whether it is limited by Guarantee or otherwise.

Its main purpose is to enable shareholders, creditors and others dealing with the Company to know what the permitted range of its enterprise is and what the nature of liability of its members is.

### Contents of the Memorandum of Association

The contents of the Memorandum of Association are :—

- (a) The name of the Company with the word "Limited" as the last word in its name, if the liability of its members is limited, unless it has been exempted by the Government from the use of this word.
- (b) The State in which the Company is to be situated, because it is the State which determines the domicile and nationality of the Company, and also the Court which can have the necessary jurisdiction.
- (c) The objects for which the Company is formed, giving the scope of its activities.
- (d) If the liability of its members is limited, the fact that it is so limited.
- (e) The amount payable by the members, in the event of a winding up, if the Company is limited by guarantee.
- (f) The amount of the Share Capital, if the Company has a share capital, and the number of shares in which the same is divided.

[Every subscriber who puts his signature on the Memorandum must take at least one share, and must write opposite his name the number of shares taken by him. There must be the signature of an attesting witness.]

### Form of Memorandum of Association of Company Limited By Shares

1ST.—The name of the Company is "The Eastern Steam Packet Company, Limited".

2ND.—The registered office of the company will be situated in the State of Bombay.

3RD.—The objects for which the company is established are "the conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4TH.—The liability of the members is limited.

5TH.—The share capital of the company is two hundred thousand rupees divided into one thousand shares of two hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.					Number of shares taken by each subscriber.
1.	A. B. of	merchant	..	..	200
2.	C. D. „	„	..	..	25
3.	E. F. „	„	..	..	30
4.	G. H. „	„	..	..	40
5.	I. J. „	„	..	..	15
6.	K. L. „	„	..	..	5
7.	M. N. „	„	..	..	10
Total shares taken					325

Dated the

day of

19 .

Witness to the above signatures

X. Y. of

**Form of Memorandum in the case of a Company Limited by Guarantee  
and not having a Share Capital**

1ST.—The name of the Company is “The Mutual Calcutta Marine Association, Limited”.

2ND.—The Registered Office of the Company will be situated in Bengal.

3RD.—The objects for which the Company is established are “the Mutual Insurance of ships belonging to members of the Company, and the doing all such other things as are incidental or conducive to the attainment of the above object.”

4TH.—The liability of the members is limited.

5TH.—Every member of the Company undertakes to contribute to the assets of the Company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the Company contracted before he ceases to be a member, and the costs, charges and expenses of winding up for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding one hundred rupees.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a Company, in pursuance of this Memorandum of Association.

Names, addresses and description of subscribers.

“1, A.B. of

“2, C.D. of

“3, E.F. of

“4, G.H. of

“5, I.J. of

“6, K.L. of

“7, M.N. of

Dated the

day of

Witness to the above signatures.

X. Y. of

### Persons who can sign the Memorandum

An alien can sign the Memorandum, unless he is an alien enemy. A firm cannot sign the Memorandum, because it is not a persona legal, but the partners of a firm can individually sign the Memorandum. A registered Company can, through some representative, sign the Memorandum, because it is a persona legal, provided its constituent documents give it the power to do so or to have shares in another Company. Whether a minor can sign the Memorandum is not free from doubt.

### Distinction between Memorandum and Articles

- (1) The Memorandum is the **principal** document, which, upon registration, gives the Company its legal existence (with the Certificate of Incorporation), and **defines the scope of its activities**. The Articles, on the other hand, are only the **subsidiary** document, dealing with the **manner** in which the objects for which the Company has been formed are to be carried out.
- (2) For an alteration of the Memorandum, **the sanction of the Court, in most cases**, is required, but for an alteration of the Articles, all that is required is a **special resolution** of the members of the Company.
- (3) Whenever there is a conflict between the Memorandum and the Articles, the provisions of the Memorandum will over-ride those of the Articles.
- (4) If the Memorandum has an ambiguous provision in it, the Articles may be taken help of to remove the ambiguity.

### Alteration of the Memorandum

The Memorandum can only be changed as laid down by the Companies Act. Sir Francis Palmer has described the Memorandum as the "unalterable Charter of the Company." In a sense the Memorandum is the unalterable Charter. It is unalterable, **unless** the provisions of the Companies Act are fully satisfied to procure the alteration. If the provisions of the Act are satisfied, the clauses or provisions of the Memorandum can be altered.

The Memorandum of Association can be altered in the following particulars :—

- (1) The change of Name ;
- (2) Change of the State ;
- (3) Alteration of the Objects ;
- (4) The increase, reduction, consolidation, or re-organisation of the Share Capital ,
- (5) The conversion of the limited liability of the directors into unlimited liability; if the articles so allow.

### Change of Name

The Company's name can be changed by a special resolution, i.e., a resolution at a meeting of the Company, of which 21 days' notice was given to all the members entitled to be present and to vote thereat and passed by a three-fourths majority of the members present in person or by proxy. The special resolution has then got to be sanctioned by the State Government. If the Government approves the new name, the same has to be registered with the Registrar of Companies of the State concerned, who would then issue a Certificate of Incorporation, altered to meet the altered circumstances.

### Change of the State

The registered office of a Company may be shifted to a different State by an alteration of the memorandum, effected through a special resolution of the members of the Company, confirmed by the Court. A certified copy of the Court's order must then be filed with the Registrar in each of the States, i.e., the old State as well as the new State. The Registrar in the old State will send all the documents to the Registrar in the new State.



### Alteration of Objects

The objects clause of the Memorandum can be altered by a special resolution of the Company, sanctioned by the Court, if a Company desires (i) to carry on its business more economically or more efficiently, or (ii) to carry on its principal objects by some new or improved method or machinery; or (iii) to extend or change the local area in which its business is carried on; or (iv) to take up or carry on some other business which may conveniently or advantageously or consistently be carried on with the existing business; or (v) to restrict or abandon any of its objects; or (vi) to sell or dispose of the whole or any part of the undertaking of the Company; or (vii) to amalgamate with any other Company or body of persons. Before confirming the alteration, the Court will see that notices have been given to all persons whose interests are likely to be affected or prejudiced by the alteration, and that every creditor entitled to object to the alteration has either abandoned the objection, or his claim is discharged to the satisfaction of the Court. The Court will also see that the alteration is fair and equitable in the interests of the members of the Company. The alteration must not be such as gives the Company entirely new and unlimited powers. In the leading English case on the point, the *Parent Tyre Company's Case*, 1923, 2 Ch. 222, Mr. Justice Lawrence said that the point is not whether the new business is similar to or dis-similar from the existing business, **but whether, though totally dis-similar, it could conveniently and effectively be carried on with the existing business.** In that case a Company which was doing the business of manufacturing tyres, vehicles and wheels, was allowed the business of banking, in so far as this business could conveniently and efficiently be carried on with the existing business—more so in view of the fact that the Parent Tyre Company had become a holding or parent company with several subsidiaries under it.

### Alteration as to Share Capital

The share capital of a Company may be altered so as to bring about an increase, consolidation and division, reduction or re-organisation of the Share Capital.

To increase the share capital of a Company **beyond the authorised or registered Capital**, all that the Company has got to do is to pass a resolution (whether ordinary, extraordinary or special), at the option of the Company. But notice of the increase has then got to be filed with the Registrar of Companies of the State concerned, and the difference in the fees, as required by Table B, must be paid to the Registrar.

Where, however, the share capital is increased **within the limits of the authorised or registered capital**, all that has got to be done is the passage of a resolution by the Board of Directors to the required effect. For an increase of share capital, it is essential that the Articles of Association of the Company must have allowed the alteration or a special resolution must have been passed to alter the Articles, so as to give the Company the necessary power to increase the share capital.

If authorised by its Articles, or if the Articles are changed to the requisite effect, the Company may consolidate and divide all or any of its share capital into shares of larger amount than its existing shares, or so as to convert all or any of its paid up shares into stock and re-convert that stock into paid up shares of any denomination, or so as to sub-divide its shares or any portion of its shares into shares of smaller amount than fixed by the Memorandum so that the proportion between the amount paid up and the amount, if any, unpaid on its reduced share shall be the same as it was in the case of the share from which the reduced share was derived. The Memorandum can also be altered so as to cancel shares, which at the date of the passage of the resolution for such cancellation, have not been taken or agreed to be taken by any person, and so as to diminish the amount of its share capital by the amount of the shares so cancelled.

### Re-organisation of Share Capital

Re-organisation means the consolidation of shares of different classes into shares of one class, or the splitting up of shares of one type into shares of different types. It can be effected by an arrangement between the Company and its shareholders or any class of its shareholders,

confirmed by the Court. When such arrangement is proposed, the Court may, on an application (made in a summary manner) by the Company or by any member of the Company, order a meeting of the shareholders or the class of shareholders, as the case may be, to be called and conducted in such manner as the Court may direct. At that meeting, if the majority in number **representing three-fourths in value** of the shareholders or class of shareholders, as the case may be, present in person or by proxy, agree to the arrangement or re-organisation, the same shall be binding on all the shareholders, or class of shareholders, as the case may be, and also on the Company, if it is sanctioned by the Court. A certified copy of the order of the Court sanctioning the arrangement must be filed with the Registrar, and unless so filed the order shall have no effect. A copy of the order of the Court must be annexed to every copy of the Memorandum issued after the Order is made by the Court. If the Company has no Memorandum, a certified copy of the Court's order must be annexed to every copy of the instrument constituting the Company.

### Reduction of Share Capital

A Company limited by shares cannot buy its own shares or the share of a public company of which it is a subsidiary company, unless the consequent reduction is sanctioned by the Court and is carried out as required by the Companies Act. If authorised by its Articles, or if the Articles are changed by special resolution so as to confer the authority, the Company may reduce its share capital by passing a special resolution and getting the sanction of the Court. Three examples of reduction are given by the Legislature. These are :—

- (1) Reduction by writing off lost share capital or share capital not represented by available assets ;
- (2) Reduction by paying back to the shareholder any paid up share capital when it is in excess of the needs of the Company ; or
- (3) Reduction by extinguishing or reducing the liability on any of its shares, in respect of shares not fully paid up.

Apart from these three ways, a Company may, in any other manner, reduce its share capital, **provided the approval and sanction of the Court are taken in that respect.**

The Court may, if it thinks fit, pass an order confirming the reduction, if it is satisfied that the consent of every creditor entitled to object to the reduction has been obtained in favour of the reduction, or else he is paid, or his claim has been discharged, or has been determined, settled or secured. The Court may impose such restrictions and conditions as it may think fit. The Court will see that reduction is, as far as possible, equitable or all round.

Reduction is said to be **pari-passu or all round** when the rights of all classes of shareholders are effected **equitably or alike.**

A Company must, after the resolution reducing the capital is confirmed by the Court, file with the Registrar a certified copy of the Order of the Court, with a minute approved by the Court, showing with respect to the share capital as altered, the amount of the share capital, the number of shares in which it is to be divided and the amount, if any, at the date of the registration deemed to be paid up on each share. This minute shall form part of the Memorandum, and when registered shall be valid as if it had originally been part of the Memorandum.

If the Memorandum is so altered as to make a member take more shares than what he holds, or so as to increase his liability to contribute to the share capital or to pay more money to the Company, such alteration will not be binding upon the member concerned, **unless he agrees in writing** to be bound by it. An alteration binds every member of the Company subject, of course, to what is already mentioned.

**No sanction of the Court is required for effecting a reduction of share capital in the case of (i) a valid forfeiture of shares, or (ii) a surrender when it is a short cut to forfeiture, or (iii) a cancellation of shares not taken up.**

A consequence of the reduction of the share capital is that the liability of the member is reduced according to the reduction, i.e., he is no longer liable to the original extent, but only to the reduced extent ; but, where a creditor of the Company who would have objected to the petition for reduction had he not been outside India, could not object at that time because he was outside India, the liability of the members would be the same unreduced or original liability, because this creditor has got a claim to be satisfied by the Company which has not enough money, by gathering the claims on the reduced liability alone.

A Company has got to use the words **“and reduced”** as the last words in its name from the very moment the special resolution for reduction is passed by the shareholders, **if the reduction is by a return of the unwanted share capital, or by extinction or diminution of the liability on the shares not fully paid up.** If, on the other hand, the reduction is by a writing off of the lost share capital or the share capital not represented by available assets, the reduction does not necessitate the use of the words **“and reduced”** from the very moment the special resolution is passed by the Company ; in such a case, the words **“and reduced”** have to be used only if and when the petition is sanctioned by the Court and the Court does not exempt the Company from the use of these words. It is open to the Court to exempt a Company from the use of these words if the reduction involves the writing off of lost Capital or Capital not represented by available assets. But the Court cannot grant exemption from the use of these words if the reduction is by a return of the **unpaid** share capital to the members, or by extinction or diminution of their liability in respect of their unpaid Share Capital. It is open to the Court to order a Company to publish reasons for the reduction or to give such other information as regards reduction as the Court may think fit in the interest of the public.

### Pre-emption

When a Company's Capital is increased beyond the authorised or registered share capital, the Company's Directors are **not** bound to offer the new shares to the existing shareholders. That was so laid down by the Supreme Court of India in *Nanalal v. Bombay Life Assurance Co.*, 1950, Comp. Cas. 179. It is only when a Company increases its share capital by the issue of new shares **within its authorised share capital**, that the existing shareholders have the pre-emption, i.e., the right or the option to have their share in the new shares according to the amount of the shares held by them.

### Reserve Liability—Reserve Share Capital

When, by a special resolution, a Company declares that a portion of its uncalled share capital shall not be called up except in the event of a winding up, the share capital so reserved is called reserved share capital, and the liability thereon is called reserve liability, because the liability of the shareholders to pay the remaining amount on the shares so reserved is postponed to the event of the liquidation of the Company.

The **characteristics of reserved share capital** are :—

- (1) Once reserved it **remains reserved till the liquidation** of the Company, and it **cannot be re-converted into ordinary share capital** by another special resolution or otherwise ;
- (2) No mortgage or charge can be validly created on it ;
- (3) No calls can be made on it till the liquidation.

### Effect of Memorandum

The Memorandum is, so to say, a Charter of the Company ; it defines the limits and sphere of its activities. It binds the Company and its members and successors as if each of them had signed it. It binds the heirs, executors, legal representatives and assigns of each member, and it constitutes a contract between the Company on the one hand and every member and his successor on the other hand. The Memorandum says whether the liability of the Company is limited or not, and if so, whether it is a Guarantee Company or a Company limited by shares alone. The Memorandum does not constitute any contract between the Company on the one hand and an outsider on the other hand.

When we say that the objects clause of the Memorandum defines the limits within which the Company is to act, we mean that it has not to do anything which is not even incidental or conducive to the main purposes of the Company. Every power need not be given in the Memorandum expressly; it is enough that the power can be implied or is ancillary or conducive to the main objects of the Company. Thus, even if the objects clause does not expressly say that the Company can borrow money or issue bills, cheques, hundis, or give mortgages or charges, or issue debentures, it can nevertheless do any of these things **if it is a trading company**, for a trading Company is deemed to have such power. A Company formed to work a patented machine, can purchase the patent; so also can a Company formed to manufacture chemical products, do scientific research work. But a Railway Company cannot work coal mines with the view to doing the business of selling coal, though it can manufacture coal for providing, for its own use, locomotive energy. A Company formed to do hotel business can let out, **for a short time**, a part of its premises, **as that may be essential to get reputation and customers**. A Company can promote another Company if its memorandum gives it the power to do so, or if it has got the power to buy shares of any other Company.

### The Doctrine of Indoor Management

**The Rule in Royal British Bank v. Turquand, 1856, 6 E. & B., 327; and Foss v. Harbottle, 1843, 2 Hare 461.**

Under the rule in *Mahony v. East Holyford Mining Company*, 1875, 7 H.L., 869, an outsider dealing with the Company is bound by notice of the contents of the Memorandum and Articles of Association, because these are documents registered with the Registrar of Companies, and anybody can inspect the same in due course. This is the **Doctrine of Constructive Notice**.

Though an outsider is bound by constructive notice of the contents of the Memorandum and Articles, he is **not bound to inquire into the internal management or indoor affairs** of the Company. He is **entitled to assume** that the internal management is regular. This is known as the Doctrine of "Indoor Management" or "Internal Affairs". (*Royal British Bank v. Turquand*, 1856, 6 E. & B., 327.) In this case it was held that even if the managing director of a Company which has by its memorandum the power to borrow money but by the Articles of which a resolution of the shareholders is required when a sum of money in excess of the specified amount is to be borrowed, borrows money in excess of such specified amount without the sanction of the shareholders, the lender (the Royal British Bank) could sue the borrower Company for the recovery of the amount borrowed by its managing director, in so far as the lender (the Bank) is not bound to enquire into whether the requisite resolution has been passed by the shareholders or not. The Bank could well assume that the resolution has been passed.

To this doctrine of internal management there are **two important limitations or exceptions**. This doctrine **does not apply to the case of a forgery**. Thus, if a clerk of a Company forges the signature of the managing director or secretary, and borrows money from an outsider, the outsider could not plead or assume the regularity of the internal management, **because a forgery is a nullity**. (*The Great Fingal Consolidated*, 1905, A.C. 439). Secondly, where an outsider **actually knows** of the irregularity, he cannot assume regularity of internal management. (*Patent Ivory Co.*, 1888, 38 Ch. D. 156.)

This doctrine of indoor affairs or internal management must be considered from another point of view also. In matters of internal management, **the majority**, as a rule, **carries the day**, and it is not open to a dis-satisfied minority, every now and then, to complain and appeal to the Court against the wishes of the majority. (*Foss v. Harbottle*, 1843, 2 Hare 461). **Unless fraud is alleged**, a member of a Company or a minority of the members cannot appeal to the Court. To this rule in *Foss v. Harbottle*, we have several exceptions stated authoritatively in the Earl of Halsbury's "Laws of England" thus:—

- (i) where the majority **plays fraud** on the minority, or;
- (ii) where the majority **has acted aggressively**, or;

- (iii) where an **illegal or ultra vires act** is stated to be committed on behalf of the Company, or ;
- (iv) **when a member's right is wrongfully interfered with or affected** ; or ;
- (v) where **failure of justice** would otherwise result ;

even one member can apply to the Court for preventing the act or the intended act or setting aside the resolution of the majority.

### Articles of Association

#### Meaning of "Articles of Association"

Articles of Association are the rules relating to the **management of the internal affairs** of a Company.

#### Alteration of Articles

Articles may be altered **by a special resolution** of the Company, and the alteration shall be as valid **as if it had originally been contained** in the Articles ; articles **can be re-altered** by special resolution. Articles can also be altered with a retrospective effect (Allen v. The Gold Reefs of Africa Ltd., 1900, 1 Ch. 656.) If Articles are altered so as to conflict with an existing contract, or cause a breach of trust or other damage, damages can be recovered by the aggrieved party, though the aggrieved party cannot insist on specific performance, or on the enforcement of his right. (Southern Foundries Ltd. v. Shirlaw, 1940, 10 Comp. Cas., 255). But Articles should not be altered so as to conflict with the memorandum, or with the Companies Act, or any other Statute for the time being in force, nor should they be altered as to be illegal or against public policy.

If Articles are altered so as to increase the pecuniary liability of a shareholder, or to make him buy more shares than what he has or what he is bound to buy, the alteration shall not be valid unless the member to be bound by the alteration consents to the same in writing.

When an alteration is effected in the Articles, every copy of the Articles issued after the date of the alteration shall be according to the alteration.

#### Effect of Articles

The Articles lay down a set of rules relating to the internal management of the Company ; secondly, they form a contract between the Company on the one hand and every shareholder, his heir, executor, legal representative or assign on the other hand ; thirdly, the Articles do not form any contract between the Company on the one hand and an outsider on the other hand. (Eley v. Positive Grant Co., 1876, 1 EX. D. 88) ; fourthly, an outsider can assume the regularity of internal management (Royal British Bank v. Turquand, 1856, 6 E. & B. 327).

### Share Capital

#### Meaning of 'Capital'

The term 'Capital' is used in various senses. It is known as '**Authorised**', '**Registered**' or '**Nominal**;' sometimes we talk of what is known as '**Issued Capital**', sometimes of the '**Subscribed Capital**', sometimes of the '**Paid up Capital**', and sometimes of the '**Working Capital**'. Anything used for the production of income is called capital.

#### 'Authorised', 'Registered' or 'Nominal' Capital

The Capital which a Company is allowed, under its Memorandum, to be registered with is called authorised, registered or Nominal Capital.

#### Issued Capital

That part of, if not the whole of, the registered or nominal share capital of the Company **as has been issued** to the members of the public for subscription, is called issued Capital.

### Subscribed Capital

Subscribed Capital is such part of, if not the whole of, the issued capital of the Company, as has been taken up or agreed to be taken up by the members of the public.

### Paid up Capital

Paid-up capital represents such portion of the subscribed capital as has been paid up on calls made by the directors for the payment of the money payable on the shares.

### Called up Capital

This is the portion of the subscribed capital with regard to which calls have been made.

### Uncalled Capital

As much of the subscribed capital as has not been called up is known as the uncalled capital.

### Alteration of Share Capital

The same has been dealt with under the heading Alteration of the Memorandum.

### Reserved Share Capital—Reserve Liability

As much of the **uncalled** capital of the Company as has been resolved upon (**by a special resolution**) to be incapable of being called up except in the course of a winding-up, is called the reserve capital of the Company.

The liability is said to be **reserved**, because no part of such capital can be called up **except in the course of a liquidation**. The characteristics of such share capital are :—

- (i) Once reserved it **remains reserved till the winding up** ;
- (ii) no calls can be made upon it except by the liquidator in a winding-up ; and
- (iii) no mortgage or charge can be validly created on it.

### Meaning of 'Share'

By 'share' is meant that **abstract right** possessed by a member of a Company to **participate** in the **profits**, and in the **capital** and in the **surplus assets** (if any) in the event of liquidation.

### Distinction between 'Share' and 'Share Certificate'

While a share is an **abstract right** to participate in the profits, capital and surplus assets, a share certificate is that **concrete document** which witnesses that abstract right.

### Distinction between 'Shares' and 'Stock'

'Shares' may be fully paid or partly paid ; but 'Stock' always represents shares which have been **fully paid up**, and which by the power under the articles have been converted into stock. Stock can be re-converted into paid up shares of any denomination **higher or lower** than the original.

### Preference Shares

Preference shares are the shares of a Company on which the holder has got the **priority** with regard to the sharing of profits in the form of dividends, and, where by the Articles it is so provided, a right also to participate in the distribution of capital (but **not surplus assets**) in the event of a winding-up. When shares are preferential both as regards dividends and capital, such shares are called preferential as regards capital. Where, however, the articles do not expressly mention that preference shares will have a priority in the return of capital in the winding up, such shares are preferential only as regards distribution of dividends. Preference shares may be **cumulative or non-cumulative**. They are said to be cumulative

when arrears of dividends during a prior year or prior years is payable during the subsequent year or subsequent years. On the other hand when the arrears of dividend are not so payable during subsequent years, the shares are said to be non-cumulative preferential. If the Articles do not state whether they are cumulative or not, **the presumption is that they are cumulative.** It is only when the Articles expressly make them non-cumulative, that they are non-cumulative. (*Staples v. Eastman Photographic Material Co.*, 1896, 2 Ch. 303).

Preference shares are said to be **participating**, when the holders are entitled to participate in any surplus profits made by the Company. Unless the articles expressly make them participating, preference shares are **deemed to be non-participating.**

Ordinarily, dividend on preference shares is payable at the agreed or fixed percentage of the profits of the Company in priority to the other shareholders.

If the Articles so allow, or are subsequently by a special resolution changed as to so allow, the Company may issue what are known as **redeemable preference shares**, i.e., shares which are to be redeemed at a definite date or after a definite notice; the Company may issue preference shares **redeemable at its option**, in which case such shares are called **non-redeemable preference shares.** Redeemable Preference shares can be redeemed out of the profits of the Company, or out of the proceeds of a special issue of shares made for the purpose of obtaining money for redeeming preference shares, or out of any money obtained by any sale of the property of the Company. If it is not fully paid up, a redeemable preference share cannot be redeemed. When redeemable preference shares are redeemed out of the proceeds of the sale of any property of the Company, or out of its profits, a sum equivalent to that applied in redeeming the shares must, out of the profits, be transferred to a reserve fund known as the '**Capital Redemption Reserve Fund**', which shall be treated as paid up share capital of the Company. The balance sheet of the Company must include a statement showing what part of the issued capital of the Company consists of redeemable preference shares. This statement should also mention the date at or before which such shares are liable to be redeemed, or if no date is fixed for redemption, the period of notice to be given for redemption. Every prospectus issued by or on behalf of the Company, or by or on behalf of any person interested in or responsible for the formation of the Company, must include particulars of the number of the redeemable preference shares intended to be issued, stating the date or the period of notice required for redemption and also the method by which redemption would take place.

In the liquidation of the Company arrears of dividend on preference shares are payable **only if there is any such provision in the memorandum or the articles or under the conditions of the issue of such shares**, but not otherwise. (*F. de Jong & Co. Ltd.* 1946 L.T. 161.)

Unless the Articles so provide, a dividend on a preference share cannot be paid free of income-tax. (*Purshotamdas v. Central India Co.*, 1918, 42 Bom. 579).

### Ordinary Shares

Shares are said to be ordinary when they do not have any preferential right attached to them. The holders of such shares are paid after the preference shareholders are paid. If the Company has deferred shares also, the ordinary shareholders are **generally** paid at a fixed percentage from the profits of the Company; but if there are no deferred shareholders, the ordinary shareholders are not paid at a fixed percentage, but are paid such sum as in the discretion of the directors may be thought fit.

### Deferred Shares

Deferred shares, also known as **management shares** or **founders' shares**, are shares on which the dividends are payable last of all. Such shareholders may be the luckiest or the least lucky, according as the profits of the Company may be. After the preference and ordinary shareholders are paid, the deferred shareholders are paid according to the profits made by the Company, and as thought fit by the shareholders of the Company upon a recommendation made by the directors.

### Bonus Shares

Shares can also be issued as bonus shares. Instead of distributing all the profits among the shareholders, a Company may think fit to issue to the shareholders what are known as fully paid bonus shares, **after a capitalisation** of the profits, provided the articles so allow or are changed so as to so allow.

### Transfer of Shares

Under the Indian Law, shares and stock in a Company are regarded as goods ; but in English Law these are actionable claims. (Fazal v. Mangaldas, 23, Bom. L. R. 1144.) **Subject to the restrictions imposed by the Articles**, a shareholder can transfer his shares. Articles **cannot completely take away** a shareholder's right to transfer his shares, for such power is given to every shareholder under the Indian Companies Act. In the case of private companies, it is **usually** provided that before a member can transfer his shares to an outsider he must offer them to the other shareholders of the Company. Ordinarily, shares may be transferred even to a man of straw. In the words of Mr. Justice Buckley—Lord Wrenbury—"the law is that a shareholder may, up to the last moment, before liquidation and for the express purpose of escaping liability, transfer his partly paid shares to a transferee, even though the latter be a pauper, and may compel the directors to register the transfer made avowedly for the purpose of avoiding liability, provided his transfer be an out-and-out transfer, reserving to himself no beneficial right to the shares." Whenever the articles give the directors the discretion to refuse to register any transfer, they may do so without being liable to show any cause for the refusal ; but when the articles do not give such discretion, the directors cannot refuse to register a transfer. In the liquidation of a Company shares cannot be transferred except with the leave of the Court, in the case of a compulsory winding-up or winding up under supervision of the Court, or except with the leave of the liquidator or to the liquidator, in the case of a voluntary winding up.

A transfer of shares must take place **in the mode laid down by the articles**. There must be a **proper instrument or deed of transfer duly signed and executed by the transferor and the transferee**, with the proper stamp duty. This instrument must then be delivered to the Company to enable its directors, if they think it fit to do so, to register the name of the transferee as a shareholder of the Company. In the case of loss of an instrument of transfer, if the directors are satisfied regarding the loss, they can, on an application in writing made by the transferee and bearing the necessary stamp, register the transfer on such terms and conditions as to indemnity as they may think fit. The transfer is deemed to be completed when the proper instrument is made out by the transferor and the transferee and handed over to the transferee along with the certificate of shares transferred. The transferee then gets the right to the shares mentioned by the Certificate, and can apply to the Company to have his name put on the register of members of the Company.

A transfer of shares may be **cum-dividend or ex-dividend**. Ordinarily, a transfer is cum-dividend, i.e., the transferee is entitled to all the dividends declared after the date of the transfer. But, **where there is an agreement to the contrary**, the transferor is entitled to the dividends declared by the Company even after the date of the transfer ; in such a case the transfer is said to be ex-dividend.

It is not the duty of the transferor to have the shares registered in the name of the transferee. The transferor **does not give any guarantee** that the Company will transfer the shares. Whether the transferee's name will be registered or not will depend upon the discretion of the directors, whenever such discretionary power is given them by the articles ; but, if the articles are silent on the point, the directors will have no right to refuse registration of the name of the transferee. Even where the articles have given the Directors the power to refuse registration, it is open to the transferee who is really aggrieved to apply to the Court seeking that the directors may be compelled to register the transfer, **provided the applicant pleads fraud or high handedness on the part of the directors**. The Directors are **not bound to give any reason** why they refused to register the transfer, provided they have at all the power to refuse registration ; but where the Directors have



**voluntarily given any reasons** for refusal to register the shares, **it shall be open to the Court to consider whether the reasons are just or unjust.** Even though the articles give the power to refuse registration of transfer of shares, the directors cannot refuse to register the name of a person to whom any shares or debentures have been **transmitted by operation of the law.** Similarly, it has been held that the directors cannot refuse to register the name of a buyer buying at a Court sale (Wahide Bus & Transport Co., 1949, Lah. 6); and so also the Company has got to register the names of **executors and administrators** in the order desired by them. (Saunders & Co., 1908, 1 Ch. 415.) Till the name of the transferee is put on the register of shareholders the transferor remains, in liability, the trustee for the transferee of the shares transferred by him to the transferee. After the date of the transfer, the transferee is entitled, as a rule, to all the dividends and is also liable for any calls in respect of the shares transferred.

When a person wishes to transfer **some only** of the shares represented by a **single share certificate**, or wants to transfer some of the shares to one person and the remaining to another person, it is not convenient for him to give up the share certificate. In such a case the transferor cannot hand over the same share certificate; so he has to **lodge** the certificate with the Company and deposit the transfer instrument also with the Company, requesting the secretary, manager, or other principal officer concerned, to take a note of the shares transferred by him to the transferee. This is known as **'lodging the certificate'**. The **noting** done by the secretary, manager or other principal officer, is called **'certification'**. When a portion only of the shares are transferred, the Company shall issue a ticket to the transferor for the balance of the shares which have not been transferred. Such ticket is called a **'Balance Ticket'**.

In the case of a **forged** transfer, the transferee can get no title to the shares whatever, **because a forgery is a nullity.** To prevent the consequences of forgery, the Company should, before registering any transfer, give notice to the transferor, asking him whether he has really transferred the shares, and stating that if within the specified period, e.g., 14 days, no reply is received, the Company would proceed to register the name of the transferee as a shareholder in place of the transferor, or regarding the shares transferred.

Sometimes a transfer is effected as a **'Blank Transfer'**. The blank transfer is a very convenient and useful method of borrowing money on the mortgage of shares. The transferor, i.e., the mortgagor (borrower) transfers the shares, leaving the name of the transferee (lender) blank, and he hands over to the mortgagee the transfer deed. If, at the time of re-payment, the mortgagor fails to repay the loan amount with the interest thereon, the mortgagee may fill in his own name in the transfer form, and then get himself registered as a transferee of the shares. When a blank transferee first wrongfully gets his name placed on the register of members and then dishonestly sells the shares, a **bonafide purchaser** would get a good title to these shares. (Fox v. Martin, 1895, 4 L.J. Ch. 473; Abdul Vahed v. Hasanali, 50 Bom. 229). A transfer of shares in blank made even after the death of the original transferor is valid (In re : Bengal Silk Co., 1941, Comp. Cas. 104).

A blank transfer is only an **equitable transfer**, and can, therefore, be **defeated by a legal transfer even of a later date.** If the articles require a transfer **by deed only**, a transfer in blank will not give the transferee a legal title to the shares but will give him only an equitable title; but if the Articles do not require a transfer to be by a Deed, a blank transfer will give a good title.

### **'Transfer' and 'Transmission' distinguished**

Transfer of shares takes place by reason of the act of the shareholder himself. Transmission, on the other hand, takes place by reason of the operation of the law, e.g., insolvency or death. A transfer takes place when a member transfers his shares, or a debenture-holder transfers his debentures to some other person. But when debentures or shares go to the executors or administrators on the death of a holder, or to the official assignee or receiver on the insolvency of the holder, that is transmission and not a transfer.

### Certificate of Shares or Stock in Company

A share or stock certificate, under the common seal of the Company, is a certificate which is **prima facie** evidence that the person named in it is entitled to the share or stock specified in the certificate. A share or stock certificate is necessary to show that a person who is the holder thereof is entitled to transfer the shares or the stock to some-one else. The share certificate also enables the holder to transfer, pledge or charge his shares. Every Company is under a duty to complete and keep ready for delivery to the person entitled, the certificates of shares, debentures and debenture stock allotted or transferred, unless the very conditions of the issue otherwise lay down. Such certificate must be prepared and kept ready for delivery within three months from the date of the allotment or transfer as the case may be, unless the articles otherwise provide.

### Share Warrants to Bearer

A share warrant to bearer is a document which is in the nature of a **negotiable instrument**, which can be issued by **any public company**, in respect of its **fully paid shares, if the Articles of Association so allow**, or are changed so as to so allow. The holder of a share warrant to bearer cannot, by virtue of the warrant alone, be regarded as a member of the Company unless the Articles so provide; but no such holder can, by virtue of the shares represented by the share-warrant alone, be qualified for directorship of the Company. A share warrant to bearer must be properly stamped. The holder of the share-warrant is entitled to transfer the share or stock comprised by the warrant by a single delivery of it without any indorsement.

When a share warrant to bearer is issued by a Company, the name of the shareholder must be struck off the register of members, and can only be restored to the register when the shareholder surrenders the share-warrant for cancellation by the Company. The Company must register the following particulars:—

- (a) The fact that the share warrant has been issued;
- (b) The date of the issue of the share warrant;
- (c) A statement of the share or stock included in the warrant, distinguishing each share by its number.

### 'Share Warrant' & 'Share Certificate' distinguished

Both are documents showing the title of the holder; but a share warrant is a document of title and a negotiable instrument. A share certificate is not a negotiable instrument, but is only a **prima facie** evidence of title. Share certificates can be issued both with regard to partly and fully paid shares, but share warrants cannot be issued in respect of partly paid shares. Every holder of a share certificate is a member of the Company, but every holder of a share warrant is not necessarily a member of the Company. A share certificate can be issued by any Company but a share warrant to bearer can only be issued by a public company.

### Prospectus

A prospectus is any document, notice, circular, advertisement or any invitation, inviting the members of the **public**, or any person intended to be one of the members of the **public**, to subscribe for any shares or debentures of a Company. But, a trade advertisement which shows on the face of it that the formal prospectus has been prepared and filed with the registrar, is not a prospectus.

If a document is marked 'private and confidential' or 'not for public circulation', it may nevertheless be a prospectus if it was used to invite the members of the public, or even one member of the **public**, to buy shares or debentures of the Company. On the other hand, even if a document is not so marked, it may not amount to a prospectus if it is not issued to any member of the public, but to friends, acquaintances, or others who were not shown the document as members of the public. The term '**issue**' when used with reference to a prospectus involves a delivery **plus an element of publicity** (however small that element of publicity may be). [Nash v. Lynde, 1929, A.C. 158].

A private company cannot issue any prospectus, because it cannot make any invitation to the public for shares or debentures. But a public company may issue a prospectus, though it is not bound to do so. A public company may gather all its capital otherwise than by an approach to the members of the public. Where, however, a public company has not issued a prospectus, it is obligatory on it to issue and file with the Registrar of Companies of the State concerned, a statement called the '**Statement in lieu of Prospectus**'.

Before a public company may issue a prospectus, it must state the date of the publication of the prospectus and file a copy of it with the Registrar of Companies on or before the date of the issue of the prospectus. When a prospectus is issued, it must state on the face of it that a copy of it has been filed with the Registrar. Every person named as a director or proposed director, or his authorised agent, must have signed the prospectus issued by or on behalf of the Company. If a prospectus is not dated and signed, the Registrar cannot register it.

### **Specific Requirements (Contents) of a Prospectus**

In the drafting of a prospectus utmost care is required. All the requirements of the section have to be satisfied. Section 93 of the Act specifies the following requirements :—

- (1) Particulars as to contents of the memorandum, the names, descriptions and addresses of the signatories to the memorandum, the number of shares taken or subscribed for by them, the number of deferred shares, if any, and the extent of the interests of the holders in the property and profits of the Company. Particulars regarding redeemable preference shares, the number, date of the redemption or period of notice required for redemption and the method of redemption.
- (2) The number of shares which a person must state in order that he may be qualified for a directorship of the Company, the remuneration of the directors, as prescribed by the articles.
- (3) The names, description and addresses of each of the directors or proposed directors, and of the managers, or proposed managers, and of the managing agent or proposed managing agent, if any, and any provisions in the articles or in any contract regarding the appointment of the manager or the managing agent and the remuneration payable.
- (4) The minimum subscription on which the directors may allot shares, and the amount payable by each applicant at the time of application and at the time of allotment, and in case of the second or subsequent offer, the amount offered for subscription on each previous occasion within the two previous years, and the amount on these occasions actually allotted and actually paid.
- (5) The number and amount of shares and debentures issued within the two preceding years, or agreed to be issued, as fully or partly paid up otherwise than in cash, and the extent to which they were so paid up, and the consideration for which these shares or debentures have been issued or agreed to be issued. The names of the underwriters, if any, and the opinion of the directors that the underwriters are persons with resources who can satisfy their obligations.
- (6) The name and address of any vendor of any property purchased or acquired, or intended or proposed to be acquired by the Company, if the purchase money is to be paid in whole or in part out of the proceeds of the issue of shares offered for subscription, or if the purchase or acquisition has not been completed at the date of issue, the amount payable in cash, shares or debentures, to the vendors of the property. If there be more than one separate vendor, the amount payable to each of them must be stated. If the vendors are a firm, the partners need not be mentioned as separate vendors. When any property has within two years prior to the issue of the prospectus been transferred by sale, the amount paid by the purchaser at each such transfer or sale must be

stated. When a business has been purchased, a statement must be made disclosing the profits of the business during each of the three years immediately preceding the issue of the prospectus, or during each year of the existence of the business. The balance-sheet of the business must be prepared.

- (7) The amount paid or payable in cash, shares or debentures for the purchase of any property, and the amount, if any, payable for the goodwill.
- (8) The amount, if any, paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscription for any shares or debentures of the Company, or as discount with regard to shares issued, showing separately the amount, if any, paid to the managing agents. (It is not necessary to show the commission payable to sub-underwriters.)
- (9) The amount of preliminary expenses.
- (10) The amount paid within the two preceding years, or amount intended to be paid, to any promoter, and the consideration moving from such promoters.
- (11) The dates of and parties to every material contract entered into by the Company, mentioning the reasonable time and place at which such material contract or a copy of it can be inspected.
- (12) The names and addresses of the auditors of the Company.
- (13) If a director is interested in the promotion of the Company, or in any property proposed to be acquired by the Company, full particulars must be given regarding the nature and extent of such interest. A statement of all sums paid or agreed to be paid and the extent of the director's interest; a statement of all sums paid or agreed to be paid to a director, or a firm in which the director is a partner, in cash or shares or otherwise, by any person either to induce him to become or to qualify as a director, or for services rendered by him or by his firm in connection with the formation or promotion of a Company.
- (14) When the Company has shares of more than one class, a mention must be made of the rights in respect of capital and dividends in connection with such classes of shares.
- (15) If the Articles impose any restrictions regarding the right of the members to attend, discuss or vote at meetings of the Company, or regarding the right to transfer shares, such restrictions must be disclosed in the prospectus.
- (16) Where any part of the sums required for the matters set out in sub-section (2) of Section 101 of the Act, is to be provided out of sources other than share capital, particulars of the amounts so provided and the sources thereof.

### **Prospectus by a Company doing Business**

When a Company issues a prospectus after having done business, it must set out in the prospectus a report by its auditors regarding the profits made by the Company and by its subsidiary companies, if any, during the three financial years preceding the issue of the prospectus, and regarding the rates of dividends paid during each of the three financial years, and particulars as to the sources from which dividends have been paid, and particulars of the cases in which no dividends have been paid on any class of shares for any of these years, and if no Accounts have been made up for any part of the period of three years ending on a date three months before the date of the issue of the prospectus, a statements to that effect. If the Company has been doing business for less than three years, the report of the accountant must be on the profits of the Company during such lesser period.

Where a Prospectus is published as a newspaper advertisement, the contents of the memorandum need not be stated in it. It is not even necessary in such a case to give the names of the signatories to the memorandum or the number of shares taken by them.

### Issue of Forms of Application for Shares or Debentures

A Company cannot issue any form of application for shares or debentures, unless such form is issued with a prospectus. Where, however, a Company is issuing the shares or debentures to its underwriters, a form of application is not necessary. Secondly, where the shares or debentures concerned were not offered to the public, a form of application can be issued without the accompanying prospectus.

### Exemption from Liability in Certain Cases

A director or other person responsible for the issue of a prospectus without satisfying the requirements of section 93 of the Act, can be exempted from liability on any one or more of the following grounds :—

- (1) That he was not aware of any matter not disclosed in the prospectus ; or
- (2) That he was under a mistake of fact ; or
- (3) That non-compliance with or contravention of section 93 was regarding any matter not capable of being regarded as material by the aggrieved party ; or

That the circumstances are such that he should fairly and justly be excused.

### The Consequences of Misleading or Incomplete Prospectus

When a prospectus does not fully state all the material and relevant facts required under section 93 of the Act, any **aggrieved party can avoid his liability to buy the shares which he had applied for, and can also sue for damages for any damage he may have suffered as the result of the false or misleading prospectus.** It is, however, requisite that the aggrieved intending purchaser of shares **must not have unduly delayed ; nor should he have done anything to show his approbation** of the transaction, e.g., accepting dividends on shares, or voting at the shareholders' meeting. In *Sharpley v. East Coast Railway Co.*, Lord Justice James said : "If a person claims to rescind his contract to take shares in a Company on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts or else he forfeits all claims to relief". (1876, 2 Ch. D. 663). A **signatory to the memorandum cannot, even on the ground of a fraudulent statement or omission in a prospectus, avoid his liability to take the shares which he has signed for on the prospectus.** The idea is that where a person, especially if he is a prominent member of the public, shows to the outside world that he is one of those concerned in the promotion of a newly incorporated Company and thereby induces other members of the public to buy shares or debentures in the Company on the strength of his high-sounding name or position, he should not himself be allowed to go out without paying for the shares he has agreed, by his signature on the memorandum, to take. (*Lord Lurgan's Case*, 1902, 1 Ch. D. 707). A signatory, however, can get rid of his liability even on the shares signed for on the memorandum, **by making a valid surrender of those shares ;** such can be the case also **when all the share capital has been subscribed up by others.**

A person responsible for the issue of the prospectus may get himself excused from liability by showing that he relied on the opinion of an expert while making the statement he did make in the prospectus, or that he relied on an official document or a public report, or a statement made by some official, or that the prospectus was issued without his consent or even without his knowledge and on becoming aware of its issue he gave reasonable notice that it was issued without his consent, or that he withdrew his consent before the prospectus was actually issued.

A person responsible for the issue of the prospectus which contains a **material omission** can be excused from liability if he can show **that even if the omission had not been made the statement would not have falsified or qualified the other statements actually made.** A promoter or director must be proved to have made an omission of a material point with such effect that an insertion of the omitted material would have falsified or qualified the other statements made in the prospectus. (*Peek v. Gurney*, 1873, 6 H.L. 377).

A prospectus must be looked at from the point of view of a **single document**, and the effect and substance of all the statements made in the prospectus must be considered on the whole. (*Aaron's Reefs Ltd. v. Twiss*, 1896, A.C. 273).

### **Statement in Lieu of Prospectus**

Where a public company does not issue any prospectus, it must issue a statement in lieu of Prospectus and file a copy thereof with the Registrar of Companies of the State concerned. The idea behind this requirement is that where vast interests are concerned, the persons likely to be affected or interested must be given a fair and complete idea regarding the affairs—financial and managerial—of the Company. (The contents of a Statement in lieu of a Prospectus are almost the same as those of a Prospectus).

For mis-statements or omissions in a Statement in lieu of Prospectus, the same consequences follow as in the case of a Prospectus.

### **Allotment of Shares or Debentures with a view that the same may be offered for Sale to the Public**

When shares or debentures are allotted or agreed to be allotted by the Company, so that the same or any of the same are intended to be offered to the public, any document inviting the members of the public to go in for the shares or debentures, is deemed to be a prospectus. When such a document is issued, its issue is governed by the provisions of the Act relating to the contents of and issue of a prospectus. There is a **presumption, unless the contrary is proved**, that shares or debentures are allotted or agreed to be allotted for being issued to the public for sale if it can be shown that the offer to the public was made within six months after the allotment of the shares or debentures, or the agreement to allot the same, or if it can be shown that at the date the offer to the public was made the whole of the consideration to be received by the Company in respect of the allotment or agreement to allot shares or debentures was not received by the Company.

### **Allotment of Shares**

The prospectus is an invitation for offers, though in it are found the words "..... shares offered to the public for subscription." It is really the person who reads the prospectus or comes to know of it and applies for the shares or debentures, that is said to be making the offer to buy the shares or the debentures. It is then at the Company's directors' board meeting that the board of directors consider the application or the offer. If they assign the required shares or a lesser number of shares to the applicant, there is said to be an **allotment**; i.e., an acceptance of the offer and an assignment of the shares to the applicant.

The form of application almost invariably has the words "for.....shares or such lesser number of shares as the directors may allot to me"; the idea behind this is that the directors would be free to allot even a lesser number of shares than what the applicant desired to have. Otherwise, under the law of Contracts the directors, by assigning a lesser number of shares, would be making a counter-proposal and the acceptance could not be regarded as an absolute one. It is essential that the directors must cause a notice, oral or in writing, or by conduct or otherwise, to be given to the allottee, so that the allottee may know that so many shares have been allotted to him. The letter of allotment must be duly stamped. It is not necessary that the letter of allotment must reach the allottee, provided it was properly posted and sufficiently addressed, i.e., the address was according to what the applicant had given in his application form.

### **Restrictions regarding Allotment of Shares**

If a Company has not made any invitation for offers, through a prospectus, it cannot make any allotment unless it is a private company, or, if a public company, it has issued a Statement in lieu of Prospectus. Excepting the case of allotment made after the first allotment of shares, and excepting a private company, no public company can allot any shares unless the amount stated in the prospectus as the minimum subscription amount has been

subscribed or gathered. The minimum subscription cannot now be any amount taken at random, but must include :—

- (1) The purchase price of any property purchased, or to be purchased, when it is to be defrayed in whole or in part out of the profits of the issue of shares ;
- (2) The preliminary expenses payable by the Company ;
- (3) The amount paid or to be paid as commissions to persons who have agreed to subscribe for shares or to procure subscription for shares ;
- (4) The amount to be repaid by the Company for monies borrowed in respect of the abovementioned matters ;
- (5) The working capital.

The minimum subscription must be reckoned **exclusive of any amount payable otherwise than in cash. At least 5% of the amount subscribed must have been received in cash** by the Company at the time the subscription is received by it. The monies so received from the applicant must be deposited and kept deposited in a scheduled bank, i.e., a bank included in the Schedule to the Reserve Bank of India Act. Until the certificate of commencement of business is obtained by the Company, or until the monies are returned to the applicants, the monies must be deposited and kept deposited in a Scheduled Bank. Where the Company is unable to procure the minimum subscription amount within 180 days after the issue of the prospectus, all monies received by it from applicants must be repaid to them without any interest. If these monies are not repaid within a further latitude of ten days, i.e., within 190 days after the issue of the prospectus, the directors shall be jointly and separately liable to repay that money with interest at 7% per annum from the expiration of the 190th day till the date of the actual payment.

### Return of Allotment

When a Company with a share capital makes any allotment of its shares, it must, within one month from the date of the allotment, file with the Registrar of Companies of the State concerned a Return of Allotment. The Return must contain particulars regarding the number and nominal amount of the shares, the name, description and address of each allottee and the amount, if any, paid or payable on each share. When shares are allotted as fully or partly paid up otherwise than in cash, the Company must, within one month after the allotment, produce for inspection by the Registrar, a contract in writing showing the title of the allottee to the shares, with any contract for sale or for services or other consideration regarding which the allotment was made, and the Company must also file with the Registrar a verified copy of all such contracts and a return stating the number and nominal amount of all the shares so allotted, and the extent to which they are to be regarded as paid up, and the consideration for which they have been allotted. Where a contract is not in writing, prescribed particulars of the contract (as required under the Indian Companies Rules) must be filed with the stamp duty as would have been payable if the contract had been in writing.

### Forfeiture, Surrender and Lien

**If the Articles so permit**, a Company can forfeit the shares of any of its members **for non-payment of calls, but not for any other debt.** A forfeiture must be made **strictly in accordance with the provisions of the Articles** and *bona fide* by the directors in the exercise of their discretionary powers. Shares cannot be forfeited for non-payment of any money other than on a call. (*Hopkinson v. Mortimer, Harley Co., 1917, 1 Ch. 646*).

On forfeiture, the shareholder ceases to be the holder of the forfeited shares to which the Company then becomes entitled. The Company may dispose of the forfeited shares **as permitted by the law and by the articles.** The articles generally give the power to sell or deal with the forfeited shares. **If the articles, so state**, a Company can, even after the forfeiture, sue the member for the recovery of the amount due on the unpaid call ; **and if the Articles so provide**, the Company can even sue for interest during the period of the

default in payment of the call. (*Agra Electric Stores*, 54 All. 541). In a winding up, the liquidator cannot cancel a valid forfeiture (*In re China Steamship Co.*, 1868, 6 Eq. 232). The Company **cannot sue** a member for non-payment of any **further** call made **after** the date of the valid forfeiture. **With the consent of the member concerned**, the Company may cancel the forfeiture. The balance-sheet as also the Annual List of Members and Summary must disclose the total amount of shares forfeited. An invalid forfeiture can be restrained by an injunction of the Court.

### Surrender

A surrender of shares implies that the member himself gives up his share to the Company. Surrender should not be accepted by the directors, **unless it is either a short cut to forfeiture or it does not involve any reduction of share capital** (*Bellerby v. Rowland & Marwood Steamship Co.*, 1902, 2 Ch. 14). If the circumstances are such that even if the surrender had not been made by the shareholder the directors would have forfeited the shares, the directors may well be justified in accepting the surrender, in so far as the surrender is a short cut to forfeiture.

### Lien

A lien means a right to **detain** any property belonging to another person **for non-fulfilment of an obligation or due**. If the articles give a lien, the directors can cause the shares of a member to be taken away for non-payment of any debt which is a lawful debt within the period of limitation, i.e., which is not time-barred. A lien on shares extends to a lien on dividends. (*Hague v. Denderon*, 1848, 2 Ex. 741). A lien creates a charge in favour of the Company; and this charge can be assigned to another also. (*Everitt v. Automatic Weighing Machine Co.*, 1892, 3 Ch. 506). The Company's lien is a **non-possessory** lien, i.e., it does not depend upon possession for its enforcement. The lien is lost if the Company registers a transfer of shares instead of exercising its lien. (*Northern Assam Tea Co.*, 1870, 10 Eq. 458). A Company can waive its lien.

### Commissions and Discounts

A Company can pay certain kinds of commissions and discounts, e.g., to underwriters, provided the articles authorise the same, and provided the fact is disclosed in the prospectus or statement in lieu of prospectus. The total amount of the commission paid or discount allowed must be stated in every balance-sheet of the Company and in the Annual List and Summary, until the whole amount has been written off.

### Underwriting

With a view to protecting the Company against the consequences of an inadequate subscription by the members of the public, and with a view to enabling it to get the requisite amount of share capital—the minimum subscription amount, in case of a public company—provision is made for underwriting of shares. **Underwriters** are persons who, **like insurers**, undertake to buy such number of shares as are required to make up the requisite share capital of the Company. In consideration of the risk undertaken by them, they are paid a commission or discount which is not refundable by them even if actually they are not required to take up even a single share. Their commission is not that of a mere broker but is equivalent to a premium paid to an insurer for running the risk. Sometimes underwriters, finding that they have undertaken too heavy a responsibility or liability to be borne by them, underwrite in turn with other underwriters, so as to get rid of their entire liability or a portion of their undertaking. That is called **sub-underwriting**. Underwriting commissions must be disclosed in the prospectus; but sub-underwriting commissions need not be so disclosed.

### 'Placing' of Shares

A person who agrees to find a buyer for shares of a Company is said to **'place'** the shares of the Company. Such person is not responsible to take shares placed by him if he cannot find out the purchaser. He gets his commission only if he finds a purchaser for the shares.



### Issue of Shares at Discount

A Company can, while re-issuing forfeited shares, issue them at a discount thus giving credit for the calls already paid by the original allottee. Under section 105-A of the Act, a Company may issue at a discount shares **of a class already issued** provided the rate of discount **does not exceed 10%**, and provided the issue is **authorised by a resolution passed in a general meeting** of the Company and is **sanctioned by the Court**. **At least one year should have elapsed since the date at which the Company could commence business**, and the issue must take place within six months after the date of its being sanctioned by the Court, or within such extended time as is allotted by the Court. Particulars of the discount as has not been written off at the date of the issue of the prospectus or the balance-sheet of the Company must be contained in the prospectus, and in every balance-sheet subsequent to the issue.

### Promoters

Promoters are persons who take part in the formation of a Company. A Company can promote another Company if allowed by the Articles to do so. A person who merely renders professional advice, e.g., a lawyer or an accountant, is not a promoter. A promoter then is one who is **really himself interested in the formation of the Company**. A share-broker is not, **without more**, a promoter. Promoters stand in **fiduciary relation to the Company**, and they are liable for any secret profits made by them.

A promoter can be held liable **personally** on a preliminary contract made by him with some one else, in so far as the Company was not in existence at the time such contract was entered into by him, **unless there be a clause in the contract** that the Company **alone** could be held liable if after its incorporation it entered into a new contract embodying the terms of the original contract and that if it did not enter into such contract the promoter would not be held liable and his Contract would not take effect but would be deemed to be discharged.

### Membership

A person becomes a member of a Company by taking shares from the Company, or from the market or from another person and then having his name registered as a shareholder or by devolution and transmission, e.g., in the case of death. A person ceases to be a member by a valid transfer of shares, or by a forfeiture or valid surrender, or by his insolvency in which case the shares go to the official assignee or the receiver.

As a rule, **a member is he whose name is on the Register of Members of the Company**. This statement means that unless the name of a person who is a shareholder is on the Register of Members of the Company, he cannot, in law, be regarded as a shareholder or member of that Company. To this there are several exceptions. If a person's name has been erroneously or wrongfully included in the Register of Members, he is not a member, unless **with knowledge** that his name was so included he has kept quiet, **thus giving his acquiescence**. So also is a person whose name ought to have been on the Register but is wrongfully kept out of the Register, regarded as a shareholder, and he can have the Register rectified under an Order of the Court for such **rectification**, if the directors do not rectify the register. Moreover, a holder of a share warrant to bearer may be regarded as a member of a Company if the articles so provide, though his name is always struck off the Register the moment he is given the share warrant to bearer. The signatory to the memorandum is deemed to be a member of the Company though his name may not be on the Register of Members.

### Register of Members

Every Company must have in one or more books a Register of all its members. This Register must contain the following particulars:—

- (1) The name, address and occupation of each shareholder or member of the Company, and if the Company has share capital, a statement of the shares held by each shareholder, distinguishing each share by its number;

- (2) The date at which each person's name was entered in the Register as a member ;  
and
- (3) The date at which any member ceased to be a member.

The amount paid or agreed to be paid on the shares of each member must be included in the statement of the shares held by each shareholder.

The Register is **prima facie** evidence of all matters stated in it. Unless it is in a form as to itself constitute an Index, a Company must have a separate index of the names of its members **if it has more than 50 members**. The index may be in the form of a Card Index. The Register and Index must be kept by every Company at its Registered Office and should be open for inspection by any member free of all charge, and by other persons on payment of one-rupee or such lesser sum as the Company may have prescribed. Two hours atleast every day must be allowed for the inspection of the Register. A member or other person inspecting the Register **can make extracts** from the Register and Index. A member or other person may ask the Company for a copy of the Register or any portion thereof, or of the Annual List of Members and Summary, or any portion thereof, by paying for the same at the rate of six annas per every 100 words or fractional part thereof required to be copied. Non-working days and days on which the Company has closed its Transfer Books are to be excluded in calculating the period within which the company has to furnish the copy asked for ; that period is ten days from the date on which the Company is asked to send a copy. The Company can close its Register for a period not exceeding in the whole 45 days in each year and not exceeding 30 days during any particular period. It can close its Register by giving seven days' notice previous to the closing of it ; the notice must be by advertisement in some newspaper circulating in the locality of its Registered Office.

### **Rectification of Register of Members**

Any aggrieved person, or the Company, or any shareholder of the Company, can apply for rectification of the Register of Members. In the first instance, an application should be made to the directors of the Company, but if they refuse to rectify the Register, a petition may be presented to the Court for the necessary rectification. When an order for rectification is made by the Court, it is the duty of the Company to file with the Registrar a notice of the rectification within fourteen days from the date of the compliance of the Order of the Court.

### **Branch Register or British Register**

When a Company incorporated in India has a branch in any part of the United Kingdom, its Register of Members in the United Kingdom is called a Branch or British Register. The Branch or British Register is a part of the Indian Register.

### **Annual List of Members and Summary**

Every Company with a share capital must make a list of its members and of all persons who have ceased to be members. Such list must, within 18 months from the incorporation of the Company, and thereafter once atleast in every Calendar year, be made by every Company with a share capital. The Annual List must contain the following particulars :—

- (1) The name, address and occupation of each of the past and present members, and the number of shares held by each of the present members at the date of the return, and of the shares transferred since the date of the last return, or in the case of the first return, the shares transferred since the date of the incorporation, and the date of registration of the transfer, and a summary showing the shares issued for cash as distinguished from shares issued as wholly or partly paid up otherwise than in cash ;
- (2) The amount of the share capital of the Company and the number of shares into which it is divided ;
- (3) The number of shares taken upto the date of the Return ;

- (4) The amount called-up on each share ;
- (5) The total amount received as calls ;
- (6) The total amount of calls unpaid ;
- (7) The total amount paid as commission in respect of shares or debentures and the total amount allowed as discount in respect of shares or debentures ;
- (8) The total number of shares forfeited ;
- (9) The total amount of share warrants issued and the total amount of share warrants surrendered ;
- (10) The total amount of shares or stock for which the share warrants are outstanding at the date of the Return ;
- (11) The number of shares or amount of stock comprised in the share warrants ; and
- (12) The name and address of each person who at the date of the Return is a director of the Company, and of each person who at the date of the Return is a manager or managing agent of the Company, and the changes in the personnel of the directors, managers, managing agents since the last Return, with the dates at which such changes took place ; and the total amount of debt due from the Company with regard to all mortgages and charges required to be registered with the Registrar.

The Annual List of Members and Summary must be included in a separate portion of the Register of Members and must be completed and kept ready within twenty-one days from the date of the first general meeting or the only ordinary general meeting in the year.

A private company must, along with the Annual Return, send a Certificate signed by a director or other officer of the Company that it has not since the date of the last Return, or in the case of the first Return since the date of the incorporation of the Company, issued any invitation to the members of the public to go in for shares or debentures of the Company. If the Return shows that the number of persons exceeds fifty, the Company must send a Certificate signed by a Director or an officer that the excess can be explained by the fact that there are joint shareholders or nominees or employees of the Company who are not to be counted in counting the number of fifty.

### **Variation of Shareholders' Rights**

The rights of shareholders or a class of shareholders, can be varied or abrogated in accordance with the powers to do so given by the memorandum or the articles ; the minority would be bound by the majority voting in favour of the alteration or the abrogation, unless the majority is oppressive or fraudulent and an appeal has been made to the Court. But under Section 66A of the Act, an additional valuable right is given to the minority of the shareholders to appeal to the Court against the majority vote even when there is no fraud or mala fides on the part of the majority. Any minority of shareholders, being holders of at least 10% of the issued shares of the class affected, can apply to the Court for setting aside the majority vote. The application must be made within 14 days from the date at which the resolution altering or abrogating the shareholders' right was passed. If the Court allows the application, the alteration or abrogation shall not take effect ; but if the Court dismisses the application, the alteration or abrogation shall take effect. The Court's decision is final and no appeal lies from it.

### **Trusts and Equitable Interests**

A Company cannot, and need not, take any notice of any trust, express, implied or constructive. If Companies are made liable with notice of trusts, there would be much hardship and inconvenience in the carrying on of the business of the Company. If a trustee embezzles the shares given in trust by fraudulently transferring them, the Company cannot be held liable for the breach of trust. But though the Company is not liable, the directors may be

held liable personally, **if in spite of knowledge of the Trust**, they register the transfer wrongfully. (*Rainford v. James Keith Ltd.*, 1905, 2 Ch. 147.) If a Company has notice of a mortgage or a charge, it will be affected by the notice, with the result that the mortgagee or the person in whose favour the charge is executed shall have priority over the rights of the Company. (*Rainford v. James Keith Ltd.*, 1905, 2 Ch. 147.)

It is the trustee who is regarded as the legal owner of the shares which have been given in trust by the maker of the trust. The Company has got nothing to do with the beneficiaries. It is the trustee's name alone that is on the Register of Members, and it is the trustee alone who can be held liable for non-payment of calls. If there is a lien against the shares, the Company cannot exercise that lien in case the beneficiaries (and not the trustee) are indebted to the Company, because the beneficiaries are not the members, but the trustee is the member. Likewise, where a trustee is indebted to the Company, the Company can exercise its lien against the shares, though the beneficiaries are in no way indebted to the Company.

### Directors

#### Legal Position of Directors

A director is in the position of an agent towards his Company. A Company cannot function by itself ; it must have some instrumentality ; the directors are, in a sense, the agents of the Company.

#### Directors Obligatory

In a public company, or in a private company which is the subsidiary of a public Company, directors are obligatory, so that there must be atleast three directors. But in a private company which is not the subsidiary of a public company, no director is obligatory. (*In re Bulawayo Market Co.*, 1927, 2 Ch. 458.)

#### Appointment of Directors

The first directors of a company are appointed by the articles of association ; but if the articles do not appoint any directors, the signatories to the memorandum become the first directors. Unless the first directors have been appointed by the articles as permanent directors, the members of the Company appoint directors at the Annual General Meeting. It is open to a Private Company to have all permanent directors, unless it is a subsidiary of a public company. In the case of a public Company not more than one-third of the directors can be permanent directors ; atleast two-thirds of the whole number of directors must be liable to retire by rotation. Regulation 78 of Table A provides for the compulsory retirement and rotation of directors of public companies, and of private Companies which are the subsidiary Companies of public Companies.

Any casual vacancy, e.g., a vacancy occurring by death, retirement, resignation or insolvency of a director, but not such as one occurring by efflux of time, may be filled by the Board of Directors, so that the director so appointed shall have to retire at the same time at which the director in whose place he was appointed would have retired.

Any amendment of the articles of association or any alteration of the contract, which relates to the appointment of a managing director or election of a director who is not liable to retire by rotation, shall be regarded as void, unless approved by the Central Government. So also an increase in the number of directors above the maximum number fixed by the articles, by an alteration of the articles, is void unless approved by the Central Government. These provisions do not apply to a private company unless it is subsidiary of a public company.

#### Remuneration of Directors

The office of a director is an honorary office, **unless some remuneration has been prescribed by the Articles, or is allowed under some contract or under a resolution of the shareholders of the Company.** As a rule, the remuneration of directors is fixed by the articles. A director is not entitled to travelling expenses incurred in attending meetings of directors, **unless the same is allowed under the articles.**

Any change in the articles or in any agreement, purporting to increase the remuneration of the managing director, or of any director not liable to retire by rotation, shall be void, unless approved by the Central Government. But this provision does not apply to a private Company unless it is a subsidiary of a public Company.

### Qualification of Directors

Under the Act no share qualification is required. Table A requires the taking of at least one share for a directorship ; but that provision in Table A is only an illustrative provision, and not a compulsory regulation. Though not a single share is required under the Act for a directorship, the articles usually provide some share qualification, except for ex-officio directors. A director must not have his qualification shares given to him as a gift ; otherwise he would be liable to pay for the same. But a director may hold his qualification shares as a trustee for another person or other persons, unless the articles otherwise provide. Unless forbidden by the articles, a director may hold his qualification shares jointly with some other person or persons. If a director sells or transfers his qualification shares, he shall have to vacate the office of director. (In re Glory Mills, 1894, 3 Ch. 473 ; Brigg's Case, 1910, 1 Ch. 444.) A person does not lose his qualification shares or directorship merely because he mortgages his shares to someone else (Cumming v. Prescott, 1837, 2 Y. & C. 488). The holder of a share warrant to bearer is not, by virtue of the shares represented by the warrant alone, qualified for directorship ; he must have **separate** qualification shares as required by the Articles.

A Company registered under the Act can be a director, managing director, managing agent or manager of another Company. (Bulawayo Market Co. Ltd., 1907, 2 Ch. 458.) A director who ceases to hold his qualification shares must vacate office (Section 86 I).

An undischarged insolvent cannot act as a director, and if he acts as such he shall be liable to the penalties of the law. Moreover, a director must be of sound mind. If he becomes insane later, he will have to vacate office on his being declared insane by a competent Court of law.

An improperly appointed director is called a **de facto** director ; all his acts shall be regarded as valid **till the discovery of the defect** in his appointment. Once his appointment is discovered defective, he must not act ; or his acts shall be regarded as void.

A de facto director is not entitled to any remuneration, though it is open to the Court, in its discretion, to allow him something quantum meruit, i.e., what is deserved for the work done.

### Removal of Directors

A member of a Company may **by an extra-ordinary resolution** remove any director appointed or elected on or after 15th January, 1937, whose period of office is liable to terminate by a rotation of directors, **even before the expiration of the period**, and may by an ordinary resolution appoint someone else as a director in his place.

### Vacation of Office of Director

A director must vacate office in any of the following cases :—

- (1) Adjudication as insolvent ;
- (2) Adjudication as insane ;
- (3) Failure to obtain qualification shares within the time allowed, i.e., within two months after appointment, or within such shorter time as is fixed by the Articles ;
- (4) Ceasing to hold the qualification shares ;
- (5) Failure to pay monies due on calls made, within six months from the date of the call ;

- (6) Holding or accepting an office of profit, excepting the office of a legal adviser or a banker, managing director or manager. But **with the leave of the Company's shareholders** such office can be held ;
- (7) Absence from three consecutive meetings of the Board of Directors or from such Directors' Meetings for a continuous period of three months, whichever is longer, without the leave of the Board of Directors ;
- (8) Acceptance of loan or guarantee from his Company by a director or by any firm of which he is a partner or by any private Company of which he is a director ;
- (9) Entering into any contract of sale or purchase from or supply of goods or materials to the Company by its director or by a firm of which the director is a partner or by a private company of which he is a member or director, without the consent of the Board of Directors ; and
- (10) Any other ground fixed by the Articles.

### Register of Directors, Managers and Managing Agents

Every Company must keep, at its registered office, a Register of its Directors, Managers and Managing Agents. The Register must contain, in the case of an individual, his name in full, any former name or surname in full, his usual residential address, his nationality, and if that nationality is not the nationality of origin, his nationality of origin, and his occupation, if any, and particulars of other directorships. In the case of a Corporation, the name of the Corporation and its registered or principal office, and the full name and address, and nationality of each of the directors. In the case of a firm, the full name, address and nationality of each partner in the firm and the date on which each became a partner in the firm. Whenever there is any change in the personnel of the Directors, Managers or Managing Agents or in any of the particulars regarding them, a notification in the prescribed form regarding the change must be sent to the Registrar within fourteen days from the date of the change. This Register must be kept open during business hours for inspection by every member free of all charges and by outsiders on payment of one rupee, or such lesser amount as may be prescribed by the Company.

### Legal Position of Directors

#### As Trustees and as Agents

Directors are, in a sense, agents of the Company they represent. The Company is a legal entity that can only function through some person or persons in charge of its affairs. These persons are the directors. In so far as the directors are the select few, chosen by the shareholders to steer the wheel of the Company's organisation, they can be regarded as agents of the Company. But they are not agents in the ordinary sense of the term 'agent'. Whereas they are agents, in the limited sense, for the shareholders **as a body**, they are **not agents of individual shareholders**. For any ultra vires act of theirs the Company may not be liable, but they themselves are liable for what is known as a breach of warranty of authority. For acts which are intra vires they themselves are not liable but the Company is, provided the act or the acts were done **in the name of and on behalf of the Company**.

Directors are trustees ; directors are not trustees. Both these statements are true enough. Directors are **not** trustees in the sense of the expression 'express trustee'. They are not appointed under any trust deed ; nor are they implied trustees. **They are only constructive trustees**, i.e., their relation towards their Company is a **fiduciary** relation. They are trustees only in the sense that they must act only in the best interests of the Company, and not in their own interests, and that they must not make any secret profits or benefit for themselves. They are trustees in so far as the Company has reposed in them its management, with vast discretionary powers, e.g., in the matter of allotment of shares, accepting transfers of shares, the forfeiting of shares, the accepting of surrenders of shares, the exercise of lien over shares, the recommendation of dividends. They are trustees for the shareholders **as a body**, but **not for any individual shareholder**.

### Powers and Duties of Directors

**The powers of directors may be summed up as follows :—**

- (1) The power to issue shares ;
- (2) The power to allot shares ;
- (3) The power to refuse registration or transfer of shares, if and when allowed by the articles ;
- (4) The power to recommend dividends ;
- (5) The power to contract on behalf of the Company ;
- (6) The power to make calls in accordance with the articles, and to accept full amounts on the shares or a part of such amount before calls are actually made for such payments ;
- (7) The power to forfeit shares for non-payment of calls ;
- (8) The power to accept surrenders of shares in accordance with the Articles, and in such circumstances that there is no unwarranted reduction of share capital ;
- (9) The power to invest the funds of the Company in a proper manner, i.e., to invest in trust securities alone whenever the articles so require ;
- (10) The power to have reserves and to capitalise profits to the extent allowed by the Articles :

The above-mentioned powers have been amply described in that case of classic importance, viz., *The City Equitable Insurance Co.'s case*, 1925, 1 Ch. 407.

In a winding-up, a director cannot exercise his powers or act on behalf of the Company, except to the extent to which the Court or the liquidator (in a Compulsory Winding-up) or the Company in General Meeting or its liquidator (in case of a Members' Voluntary Winding up), or a Committee of Inspection or the Meeting of Creditors (in the case of Creditors' Voluntary Winding-up), allows.

**The duties of Directors may be summed up as follows :—**

- (1) Directors must, as a rule, attend personally to the business of the Company. But if the business is such that delegation becomes necessary, they can delegate their functions and duties to officers like accountants, managers, treasurers, cashiers and others. (*City Equitable Insurance Co.'s Case*, 1925, 1 Ch. 407).
- (2) They must act with care and diligence, though they are not liable for honest errors of judgement without any material negligence (*City Equitable Insurance Co.'s case*).
- (3) They are justified, in the absence of grounds of suspicion, in trusting the old and trusted servants of the Company (*City Equitable Insurance Co.'s case*).
- (4) It is their duty to see that the funds of the Company are, from time to time, properly invested. Investment need not be in trust securities, unless the articles require investment in such securities. (*Burland v. Earle*, 1902, A.C. 83).
- (5) They are not bound to give continuous attention to the affairs of the Company ; their duties are only of an intermittent nature. (*City Equitable Insurance Co.'s case*).
- (6) It is **not** their duty to supervise personally the valuable securities of the Company. That duty is allotted to some of the officers of the Company, like the manager, accountant or principal cashier. (*City Equitable Insurance Co.'s Case*).

- (7) Before recommending any dividends they should see that losses in circulating capital are first made good; otherwise they will be liable and shall have to make good to the Company such losses. The losses in fixed capital need not be accounted for or made good. (*Lagunas Nitrate Syndicate*, 1899, 2 Ch. 392).
- (8) In issuing the Balance Sheet and their Report they should consider the nature and character of the assets of the Company and should have a complete list of such assets and investments. They are not justified in merely relying on the assurance or opinion of the Chairman or Auditors as to the value of the assets.

### Dividends

Dividends are recommended by directors at the meeting of the members of the Company. The members then consider the recommendations of the directors and if they think fit, sanction the dividends. The members cannot ask for more than what is recommended by the directors, but they can curtail the rate suggested or recommended by the directors. Before recommending any dividends, directors must take care to make good all the losses in Circulating Capital, though not losses in Fixed Capital. (*Ammonia Soda Co. v. Chamberlaine* 1918, 1 Ch. 266). From the date dividends are declared by the Company, they become a debt due by the Company to the shareholders. The period of limitation within which dividends can be sued for is six years from the date of the declaration. (*Tata Iron & Steel Co. Ltd.*, 1940, 42 Bom. L. R. 57). **Subject to the Articles**, dividends must be paid not according to the amounts paid on the shares but according to the nominal value of the shares. But **the Articles usually provide** that dividends shall be paid not according to the nominal value of the shares **but according to the amounts paid on the shares**. It is open to the directors in the bona fide exercise of their discretion to refuse to recommend any dividends **though the Company has during the year made good profits**. They can have the same carried forward to some reserve fund, like the Dividend Equalisation Reserve Fund, or they can have the profits capitalised and issue bonus shares. Directors may, from time to time, pay to the members interim dividends as appear to them justifiable. Before an interim dividend is actually paid up, the directors may, acting bona fide, reconsider the question and decide whether the same should be paid at all. (*Lagunas Nitrate Co. Ltd.* 1901, 85 L.T. 22).

**Dividends cannot be paid out of the share capital, though for the purpose of construction or fortification** of the tools and machinery, plants and utensils of the Company, **interest may be paid out of Capital**. When dividends are paid out of profits, the directors must take care that dividends are paid not out of gross profits but out of **net profits**. But, it is not obligatory to pay dividends out of the net profits alone; **dividends may be paid out of some other funds of the Company (not being the Share Capital)**, e.g., **out of the Dividend Equalisation Reserve Fund**. "There is a vast difference between paying dividends out of Capital and paying dividends out of other monies belonging to the Company, **and which is not part of the share capital mentioned in the Company's Memorandum of Association**." (Per Lindley L.J., in *Verner v. General and Commercial Investment Trust Ltd.*, 1894, 2 Ch. 239). In *Devey v. Cory* (*National Bank of Wales*) 1901, A. C. 477, the Lord Chancellor stated: "the mode in which the business is carried on, and what is usual or the reverse may have a considerable influence in determining the question what may be treated as profits and what as Capital. Even the distinction between Fixed and Floating Capital which in an abstract treatise like Adam Smith's "Wealth of Nations" is appropriate enough may with reference to a concrete case be quite inappropriate. It is easy to lay down that you must not pay dividends out of capital, but the application of that very plain proposition may raise a question of the utmost difficulty in practical solution." In *Foster v. New Trinidad Asphalt Co. Ltd.*, 1901, 1 Ch. 208, Mr. Justice Byrne said: "..... an appreciation in total value of Capital Assets, if duly realised..... may, in a proper case, be treated as available for the purpose of dividend."

A shareholder who is an alien enemy cannot be paid any dividend on the shares held by him. Such dividend must be paid to the Custodian of Enemy Property (*Aramaya Mines Ltd.*, 1922, 2 A.C. 406).



### Payment of Interest out of Capital

Dividends cannot be paid out of share capital ; but interest can be paid out of Capital. Where a Company feels the necessity to construct any works or building or plant or machinery for making the business more profitable or more productive, it may issue shares for raising money to meet the necessary expenditure for such construction or improvement, and can pay interest on so much of the share capital as is for the time being paid for the period and may charge the same to Capital as part of the cost of construction of the work or building or the provision of the plant. The rate of interest **must not exceed 4% per annum, or such lesser rate as the Central Government may have notified**, and the consent of the Central Government (by delegation the State Government) must have been taken. Articles of the Company must have the provision authorising the payment of such interest, or else a special resolution must have been passed by the Company authorising the payment of such interest out of Capital. The accounts of the Company must show the share capital on which and the rate at which interest has been paid out of capital during the period to which the accounts relate.

### Disabilities of Directors

- (1) Without the approval of the shareholders of the Company by special resolution, a director **cannot assign his office**. Though a director cannot assign office without such approval of the Company, **he can appoint an alternate or substitute director to act for him while he is absent from the district in which the Directors' Board Meetings are ordinarily held, provided his absence extends to three months or more and he obtains the leave of the Board** to appoint a substitute or alternate director.
- (2) A director **cannot accept any loan, or a guarantee for a loan made to him from his Company, unless it is a private Company not subsidiary of a public Company or unless it is a banking company**.
- (3) **Except with the approval of the Company** in general meeting, its director or a firm in which he is a partner or a private company in which he is a director **cannot hold any office of profit in the Company**. The office of a managing director, manager, legal or technical adviser, or banker, is not an office of profit within the meaning of this provision, and such office can be held by a director even without the leave of the Company.
- (4) Directors **cannot enter into contracts with the Company for sale or purchase or supply of goods or materials to or from the Company, except with the approval of the Board of Directors**.
- (5) **Except with the approval of the members of the Company**, directors of a public Company or of a private subsidiary Company **cannot sell or dispose off the undertaking of the Company ; nor can they remit any debt due by a director**.
- (6) Any provisions in the Articles or in any resolution or contract whereby any director, manager, auditor or officer of the Company is relieved from liability arising out of negligence, default, breach of trust or breach of duty, is void. **But a provision which indemnifies any director, manager, officer or auditor, against any liability incurred in defending any legal proceedings, civil or criminal, which result in his favour, is not invalid**. So also if any such person has sought indemnity from liability under section 281 of the Companies Act, on the ground that though he is guilty of negligence or technical breach of trust or breach of duty, he has acted fairly and honestly on the whole, and should therefore be excused, **such provision is also valid**.

### Director's Liability for Torts or Fraud of Co-Directors

A director cannot be held liable for the act, tort or fraud of his co-directors, **unless he was a party to it, or had expressly or impliedly authorised or ratified such act, tort or fraud**. (*Cargill v. Bower*, 1878, 10 Ch. D. 502 ; *Pre-Fontaine v. Granier*, 1907, A. C. 101).

### **'Managing Agents' and 'Managers'**

#### **Definitions of 'Managing Agents' and 'Manager'**

A managing agent is any individual, firm or company, empowered **under a contract with the company** to manage its **entire** affairs, subject to such control and directions of the directors as may be provided by the contract under which the appointment has taken place. Even if such a person is described by some other name, e.g., governing director, governor, manager, or managing director, he will be regarded in law as a managing agent if he falls within the definition of a managing agent.

A manager is any person who is entitled to manage the **entire** affairs of a company, being **always subject to the control and superintendence of the directors**.

#### **Distinction between 'Manager' and 'Managing Agent'**

While a manager is **always** subject to the control and direction of the directors a managing agent **may**, by his contract of appointment, be given certain powers which he can exercise free from the control of the directors. A managing agent cannot hold office for more than 20 years at a time, except in the case of a private company which is not the subsidiary of a public company, but a manager can hold office for more than 20 years at a time. A manager usually gets a fixed salary, but a managing agent ordinarily gets a fixed percentage of the net annual profits, with an office allowance.

#### **Appointment of 'Managing Agent'**

Unless a managing agent is appointed before the issue of the prospectus or the statement in lieu of prospectus, his appointment, removal or any variation of his contract of management made on or after 15th January, 1937, cannot be regarded as valid unless approved by the company in a general meeting. For alteration of the contract of appointment, approval of the Central Government is required. He is always appointed under an agreement with the Company and his powers are defined by that agreement. Unless a company is a private company which is not the subsidiary of a public company, a managing agent cannot at any one time hold office for more than 20 years, though after the 20 years get over he may be re-appointed by the members of the company. Insurance companies and banking companies cannot have any managing agents. Excepting the case of a private company which is not subsidiary of a public company, the appointment of a managing agent now requires the sanction of the Central Government. [Sec. 87 CC.]

Where, by an alteration of the articles or any contract, a managing agent's term of office is extended, such alteration shall not be valid unless approved by the Central Government. But this restriction does not apply to a private company unless it is a subsidiary of a public company.

#### **Remuneration of Managing Agents**

A managing agent, if appointed after 15th January, 1937, is paid as his remuneration **a fixed percentage of the net annual profits** of the company, **with an office allowance** as fixed by the contract of management. In case the profits earned by the company are inadequate, the managing agent is paid a minimum fixed amount under his contract of appointment. If, however, he is to be paid any **additional, special or other remuneration**, that **can only be with the sanction of the shareholders of the company** by their **special** resolution. 'Net Profits', for the purpose of this provision, mean the profits of the company determined after making allowances for all working charges, interest on loans and advances, repairs and outgoings, depreciation, bounties or subsidies, received from any Government or any other public body, profits by way of premium on shares sold, profits on proceeds of forfeited shares, or from the sale of the whole or part of the undertaking of the company; but without any deduction in respect of any income-tax or super-tax or any other tax or duties on income or revenue or for expenses by way of interest on debentures or otherwise on capital account.

Any alteration of the articles or of any contract, whereby the remuneration of a managing agent is increased, is void, unless approved by the Central Government. But this does not apply to a private company unless it is a subsidiary of a public company.

### **Power of Managing Agents to Appoint Directors**

Excepting the case of a private company the managing agents of a company can appoint **not more than one-third** of the whole number of directors of the company.

### **Powers of Managing Agent**

The powers of a managing agent are defined by the contract under which he is appointed. He is always appointed under a contract of service, and it is that contract which regulates the nature and extent of his powers. The Companies Act, however, curtails the powers of a managing agent and lays down certain restrictions on his powers and disables him from doing certain things. A managing agent cannot, except with the authority and sanction of the directors and within the limits fixed by the directors, invest the funds of the company. Managing agents cannot issue debentures, even if the Articles so allow. The company cannot delegate such power to its managing agent.

### **Disabilities of Managing Agents**

- (1) Excepting a private company which is not the subsidiary of a public company, a company cannot make any loan or give any guarantee for any loan made to its managing agent, or if the managing agent be a firm or a private company then to any partner of that firm or a member or director of the private company.
- (2) A company cannot make any loan or guarantee any loan made to any company under the management of the same managing agent.
- (3) A managing agent cannot do any business competing with the business of his company or of a subsidiary company of his company.
- (4) In spite of the Articles providing to the contrary, managing agents cannot appoint more than one third of the whole body of directors, in the case of a public company. In the case of a private company it can do so.
- (5) A managing agent, or a firm or any partner of the firm (if the managing agent is a firm) or any member or director of a private company (if the managing agent is a private company), cannot enter into any contract with his company for the sale or purchase or supply of goods and materials, unless the sanction of three-fourths of the directors has been obtained.
- (6) Excepting an investment company, a company cannot without the unanimous approval of the Board of Directors purchase any shares or stock or debentures of a company which is managed by its own managing agents.
- (7) Managing agents cannot issue debentures even if the Company has given them the power to do so. Without the authority of the directors managing agents cannot invest the funds of the company. If a managing agent is adjudicated insolvent, he must vacate office.
- (8) A managing agent cannot validly assign his or its office to another person or other persons, unless the approval of the members of the company at a general meeting is taken and the approval of the Central Government also obtained. But if the managing agent is a firm, a change in the constitution of the firm will not amount to an assignment or transfer **provided at least one of the original partners remains in the firm**. If none of the original partners remains a partner in the altered firm, the managing agency agreement comes to an end. (*Gokaldas v. Alembic Chemical Works Co., Ltd.*, 46 Bom. L.R. 265). But there is a modification of this under the new section 87 BB of the Act.

Under Section 87 BB, no change in the constitution of the managing agency firm or company shall or can have any validity or effect **unless approved by the Central Government** ; and unless such approval is obtained no such firm or company can be the managing agent. Any change in the partners or in the ownership of the shares or a change in the board of directors is a change in the constitution of the firm. But a change in the ownership of shares in a managing agency company when caused by death of a shareholder, or a change among the partners of a managing agency firm or a change in the directors or manager of a managing agency company when caused by efflux of time or by death or retirement of a partner, director or manager, shall not be deemed to be a change in the constitution of the managing agent. Where the managed company is a **private company**, the sanction of the Central Government is not required for validating any transfer of office of managing agent ; and even in a public company, transfer of shares can lawfully take place (without the sanction of the Central Government), provided the shares transferred are, for the time being, dealt in, or quoted on, the principal Stock Exchanges of India, unless the Central Government has, by notification in the Gazette, otherwise directed, for protecting the affairs of the Company concerned from being prejudicially managed.

In a winding up, a managing agent's contract is terminated automatically, but he can receive all monies due to him from the company and compensation for premature termination. He cannot receive any compensation for the premature termination of his office if the winding up has been caused by his own fault or misconduct. A managing agent cannot assign or create any charge on his remuneration or any part thereof. (*Purshotamdas v. Prasad*, 1941, Comp. Cas. 197).

Directors cannot remove any managing agent or alter his contract, without the approval of the company in a general meeting. Any contract or provision in the articles or any resolution allowing indemnity to a managing agent for any loss or damage caused to the company by his act or conduct or default, shall be regarded as void. The company can, however, validly indemnify its manager, managing agent or officer against any expenditure incurred by him in defending any civil or criminal proceedings, provided judgment is given in his favour or he is acquitted. So also he is entitled to indemnity in case he applies to the Court under section 281 of the Companies Act for relief on the ground that though he has been guilty of an act, default or negligence or a technical breach of trust, he should be excused, having acted honestly, justly and fairly.

Any alteration of the articles or of any contract, whereby a managing agent's term of office is extended, is void, unless approved by the Central Government.

### **The Company Secretary**

The Company Secretary is the head of the administrative department of a company, and is regarded as an officer and servant of the company. He may be appointed by the Articles or under some contract ; but if appointed by the Articles he does not get any legal right to the appointment or for damages in case he is not appointed, because the Articles do not form any contract between the company on the one hand and him (an outsider) on the other hand. (*Eley v. Positive Government Security Life Assurance Co.*, 1876, 1 Ex. D. 88 ; *Ahmedabad Jubilee Co. v. Chhaganlal*, 1907, 10 Bom. L. R. 141 ; *Potdar v. Sholapur Spinning & Weaving Co. Ltd.*, 36, Bom. L. R. 907).

### **Some of the Rights, Duties and Liabilities of the Company Secretary.**

- (1) As the head of the administrative department, he has the right to superintend, direct and control that department ;
- (2) He can claim, in the winding up of the company, as a preferential creditor his salary for the two months immediately before the winding up not exceeding Rs. 1,000, and the balance as an ordinary creditor ;
- (3) He can sign documents or proceedings requiring authentication by the company but he cannot do any act without the sanction of the Board of Directors whenever such sanction is obligatory ;

- (4) It is his duty to keep records of proceedings at his company's meetings, to have resolutions duly made out, and to have documents properly filed both at the company's office and with the Registrar of Companies ;
- (5) He must see that meetings are properly held according to the provisions of the Act and the statutory requirements, and that every document and resolution requiring to be filed is properly filed with the Registrar ;
- (6) He must keep ready for delivery the share certificates and debenture certificates and also see that the share transfers are actually made after the approval by the Board of Directors. It is his duty to have the lodging of share certificates and a record of transfer of shares duly effected ;
- (7) If the Articles allow, the directors can delegate to the Secretary their right to allot shares ; and the Secretary can, if the directors do delegate to him that authority, allot shares ; otherwise the Secretary cannot allot shares.

### **Office and Name**

Every Company must have a registered office at which communications may be made, transfers lodged and legal processes issued. Notice of the place of situation of the registered office and notice of any alteration of such place, must be given to the Registrar within 28 days after the date of the registration of the company, or after the date on which the change took place, according as the case may be.

Every company with limited liability must have its name painted and affixed or put up on the outside of every office **or** place in which it does its business in easily legible letters in English, and where the registered office is beyond the jurisdiction of a High Court both in English and in vernacular in use in the place in which the office is situated. But it is not necessary to so fix the board or keep its name so as the passers-by on the road or the street can see the name ; it is sufficient that the name is on the outside of the office premises.

### **Publication of Capital**

Whenever the authorised capital is published in any notice, advertisement or other publication of the company, the company **must publish also the subscribed capital and the paid up capital.**

### **The Seal and the Name of the Company**

The Seal of a limited company must have on it the company's name engraved in legible letters. All the bill-heads, letter paper and notices issued by the company, and all advertisements and official publications of the company, and all bills of exchange, promissory notes, cheques, hundis, and orders for money or goods signed by and on behalf of the company, and all bills of parcels, invoices, receipts, letters of credit of the company, must have on them the company's name in legible English letters.

### **Contractual and Borrowing Powers—Debentures**

A company can contract to the extent allowed by the objects clause of its memorandum of association and in the manner prescribed by the articles and according to the general law of the land. At one time contracts by companies had to be under the common seal of the company but now that is no longer required. A contract must be under the common seal if the articles so lay down, but not otherwise. If a company exceeds the scope of its powers, its agreement would be void being *ultra vires* the company. Even all the members of the company cannot ratify an agreement which is void *ab initio*. But if the agreement is *intra vires* the company but *ultra vires* the directors only; the company can ratify it. Money lent to a company which has no power to borrow money, cannot create any debt, and the lender cannot sue the company for the money lent, as a debt, but he can sue to recover the money he advanced to the company. A petition to wind up the company for non-payment of the money cannot lie because there is no debt created.

A trading company, i.e., a company in which buying and selling of commodity predominates, has an implied power to borrow money. A non-trading company, on the other hand, has no implied power to borrow money; it has power to do so only if it is expressly so provided in its memorandum. A trading company is deemed also to have power to make, draw, accept, indorse and issue hundis, notes, bills and orders.

### Creation of Mortgages and Charges

A company which possesses the power to borrow money can also give security while borrowing money. It can create a charge or mortgage on its property.

### Debentures

A debenture is any instrument which shows that the company is indebted. If it shows no more than the fact of indebtedness it is called a **simple or naked** debenture. But where the instrument witnesses the presence of a charge or a mortgage, i.e., a security given for the repayment of the loan, the debenture is called a mortgage debenture or a debenture with a charge.

Debentures may also be classified into **those payable to registered holders** and **those payable to bearer**. If a debenture is payable to bearer it can be transferred by mere delivery from hand to hand; no indorsement is required. But if the debenture is payable to registered holder or to his order it can only be transferred by an indorsement and delivery.

Another important classification of debentures is that of—(i) debentures with a fixed charge and (ii) debentures with a floating charge. A debenture with a fixed charge is a debenture which is in the nature of a mortgage; but a debenture with a floating charge is not a mortgage but an equitable charge. A fixed charge is a charge on some **specific** assets of the company, but a floating charge is a charge not on any specific assets but on the assets **generally**. A fixed charge, being in the nature of a mortgage, is stronger than a floating charge which can be defeated by a fixed charge **even of a later date**. In the winding up of a company, the holders of debentures with a fixed charge rank as **secured** creditors; but debenture-holders with a floating charge come only next after the preferential creditors, and before the ordinary creditors get paid. In a fixed charge the company is bound by the charge; in a floating charge the company can further go on dealing with the property charged as if the charge had never been created. In the case of a fixed charge a debenture-holder is safe with his security, but in the case of a floating charge the debenture-holder is liable to be postponed to a landlord distraining for rent or a creditor in whose favour a garnishee order absolute is made or a judgment creditor who executes a decree made in his favour by attaching and selling away the goods belonging to the company before the floating charge becomes crystallised. A debenture-holder with a floating charge is also postponed to the preferential creditors if the assets are not sufficient to pay them in full first.

A floating charge is ambulatory and shifting in its nature, hovering like a bird, and floating with the property. It is said to crystallize when a winding up takes place or a contingency like the non-payment of interest for a said period of time takes place or when a Receiver is appointed on behalf of the debenture-holders.

The following are the mortgages and charges requiring registration under the Companies Act :—

- (1) Mortgages or charges for securing any issue of debentures ;
- (2) Mortgages or charges on any uncalled Capital of the company ;
- (3) Mortgages or charges on any immovable property or any interest in immovable property of the company ;
- (4) Mortgages or charges on any movable property of the company (but not pledges) except stock-in-trade ;
- (5) Mortgages or charges on any book debts of the company ;
- (6) Floating charges on the property or undertaking of the company.

A **book debt** is a debt entered in the books of the company, or, which though not entered, ought to have been entered in the books of the company (*Shamdasani v. Pochkhanawala*, 29 Bom. L. R. 722).

A company may charge or mortgage its book debts including future book debts. (*Tailby v. Official Receiver*, 1888, 13 App. Cas. 523). A charge on the book debts is void against the liquidator and any creditor of the company unless the prescribed particulars of the charge with the instrument are received by the Registrar for registration.

If any of the mortgages or charges required to be registered is not registered, the mortgage or charge will fail as such against the liquidator and against the creditors of the company, and the creditors in whose favour the mortgage or charge is created will only be regarded as **simple** creditors. The mortgage or charge requiring to be registered must be filed with the Registrar of Companies of the State concerned within 21 days after the date of its creation together with the prescribed particulars of the mortgage or charge and the instrument witnessing the charge or a verified copy of such instrument. Any document altering any condition of a mortgage also requires registration with the Registrar of Companies.

Debentures may also be **redeemable or irredeemable**. Redeemable debentures are those which are payable back on a **specified** date or within a **specified** period fixed by the instrument of debenture. An irredeemable debenture is one which is redeemable only at the **option of the company or in the event of a winding up**.

Debentures are usually secured by the creation of trust in favour of the holders. The company becomes the maker of the trust; the beneficiaries are the debenture-holders; some other persons are made the trustees. If at the time of the repayment of the loan the company fails to repay the same, the debenture-holders with a fixed charge can have the trust property which is charged in their favour sold away. Out of the sale proceeds the debenture-holders would be paid by the trustees.

Debentures may be issued at a discount because debenture capital is not share capital of a company. It is the borrowed capital of the company. But such issue must not have been forbidden by the articles or the memorandum.

The debentures **payable to bearer** can be transferred by mere delivery. Debentures payable to **registered holders** can only be transferred by the mode laid down by the debenture instrument itself. The transfer must be registered with the company. The transferee takes, subject to the equities existing between the transferor and some other person or persons; he does not get a better title than what the transferor himself possesses, **unless the debenture instrument** provides that a clean or good transfer can be acquired by the transferee.

The Companies Act requires **dual** registration of debentures, i.e., registration with the company itself and registration with the Registrar of Companies. In case of real property, i.e., lands or buildings, being the subject of debenture, the registration is also to be effected under Section 17 of the Indian Registration Act. The Registrar of Companies keeps a Register of Mortgages and Charges with regard to each company separately. This Register must mention the date of the creation of the mortgage or charge, the amount secured by the mortgage or charge, short particulars of the mortgaged or charged property and the names of the mortgagees or persons in whose favour the mortgage has been created. A **chronological index** of the mortgages and charges must be kept by the Registrar. The Registrar must give the certificate of the registration of the mortgages and charges registered with him stating the amount secured by the mortgages or charges. If there be any mistake in the Register, the Court may order **rectification**.

A company is also bound to keep at its registered office a Register of Mortgages and Charges containing a short description of the property mortgaged or charged, the amount of the mortgage or charge, and the names of the mortgagees or other persons entitled unless the security is to bearer.

There is a right to inspect instruments creating mortgages and charges requiring registration under the Act. Creditors or members can, without any fees, inspect the same; and other persons may inspect the same by paying the prescribed fee which shall not exceed one rupee for each inspection.

### **Rights of Debenture-Holders**

- (1) Right to sue for monies due, by what is known as a **debenture-holders' action** ;
- (2) Right to sue for the enforcement of the security by **sale or foreclosure** ; foreclosure is allowed only if the debenture instrument provides for it ;
- (3) The right to apply for appointment of a Receiver to conduct the business of the company ;
- (4) If the debenture instrument allows the right to appoint a Receiver or Manager for taking charge of the mortgaged property and to sell it, the debenture-holders can do so ;
- (5) The right to present a winding up petition on the ground of the inability of the company to pay its debts ;
- (6) The right to abandon the security and to prove for the whole amount of the debt as ordinary creditors if they chose so to do, or to have the security valued and rank and prove for the deficiency.

### **Interested Directors to disclose any Interest in any Contract or Arrangement**

Any director who is directly or indirectly interested in any contract or arrangement made by or on behalf of the company must disclose, at a meeting of the directors at which the contract or arrangement is considered or determined, the nature of the particular interest in such contract or arrangement. If the director becomes interested in the contract he must disclose his interest at the first meeting of the directors after the acquisition of the interest by the director concerned or at the first meeting after the making of the contract or the arrangement. This disclosure is required even with regard to petty purchases of articles. (*Rabindra v. Emperor*, 1938, Comp. Cas. 176) A register of such contracts or arrangements must be kept by the company which enters into such contracts or arrangements. Particulars of such arrangements or contracts must be stated in the register which must be kept open for inspection by any member of the company during business hours at the registered office of the company.

### **Prohibition of Voting on any Contract or Arrangement in which Director is Interested**

Except in the case of a private company, a director who is directly or indirectly interested in any contract or arrangement made by or on behalf of a company cannot, **as a director**, vote on any such contract or arrangement. (*Pratt v. M. T. Ltd.*, 1938, 40 Bom. L. R. 1109). In a private company an interested director can vote even as a director at the Board Meeting. In a public company though an interested director cannot vote at a board meeting, he can vote at the meeting of the **shareholders** of the company **as a shareholder**.

### **Disclosure to Members in case of Contract appointing Manager or Managing Agent**

When a company enters into a contract for the appointment of a manager or managing agent or when any director is directly or indirectly interested or concerned or when the company alters such existing contract, the company must, within 21 days from the date on which such contract was entered into or varied, send to every member an abstract of the terms of the contract or the alteration, as the case may be, with the memorandum clearly indicating the interest of the director or the directors concerned in the contract or variation. The contract must be kept open for inspection by the members at the registered office of the company.



### **Contracts by Agents of Companies in which the Company is an Undisclosed Principal**

Except in the case of a private company which is not the subsidiary of a public company, a manager or any agent of the company who enters into any contract for the company and does not disclose the name of the company, **must**, when he enters into such a contract, **make a memorandum in writing** containing the terms of the contract and the name of the other party to the contract. Then he must deliver the memorandum to the company and send copies of it to the directors. Such memorandum must then be filed in the office of the company and must be laid before the directors at their next board meeting. If the manager or other agent concerned does not act in conformity with these provisions, the company may refuse to be liable under the contract. Moreover, such manager or agent is liable to a fine.

### **Arbitration**

Just as individuals can refer their dispute to an arbitrator or arbitrators, companies may refer their disputes to arbitration. But a liquidator in a voluntary winding up cannot refer any matter to arbitration. The written agreement referring the dispute to arbitration need not be under the Common Seal of the Company. (*Ganges Sugar Works Ltd. v. Nuri Miah*, 1915, 37 All. 273).

### **Compromise and Arrangement**

A company may arrange or compromise with its creditors or any class of its creditors or with its members or any class of its members in dispute. A **scheme of arrangement** may be entered into between the company on the one hand and its creditors or class of creditors or members or class of members on the other hand. When such compromise or arrangement is proposed, the Court may, on an application of the company or any creditor or member, or in the liquidation by the liquidator, **order a meeting** of the creditors or of the class of creditors or of the members or class of members, as the case may be, **to be convened, held and conducted in such manner as it (Court) may think fit**. At the meeting so held if a majority in number representing **three fourths in value** of the creditors or class of creditors or members or class of members, as the case may be, present either in person or by proxy, agree to any compromise or arrangement, the same shall be binding on all the members or class of members or creditors or class of creditors according as the case may be, and also on the company **if the arrangement or compromise is sanctioned by the Court**. The Court **cannot make its own scheme** so as to destroy the one adapted by the interests concerned. But the Court **may impose any conditions** which it may think just and expedient to impose.

Under the scheme of arrangement a company may transfer its undertaking to any other company called '**the transferee company**'; the transferor company will then, **without any winding up**, get **merged** into the transferee company. If the shareholders of the transferor company do not wish to be shareholders of the transferee company, they have to be paid up or else some settlement or arrangement, **to the satisfaction of the Court**, has got to be made with them. It is open to the Court to decide whether the price offered to the dissentient shareholders is reasonable or not; **but the Court cannot fix a price of its own judgment**.

### **Meetings and Proceedings**

#### **What is a Meeting ?**

A 'meeting' means and implies an association of persons for the purpose of doing some business or of passing some resolution for the doing or abstaining from doing something. As a rule, there must be at least two persons present to make the holding of what is known as the meeting possible. (*Sharp v. Dawes*, 1876, 46 L. J., Q. B. 174). One man cannot by himself constitute a valid meeting, **unless the circumstances are such that it is not**

**possible at that meeting to have more than one person**, e.g., where a meeting of preference shareholders is to be held to consider the question of the abrogation or alteration of the rights of preference shareholders and there is only one preference shareholder. When it cannot be held otherwise, the law will suffer a one person's meeting to be called a meeting in law also. (*East v. Bennett Bros. Ltd.*, 1911, 1 Ch. at p. 168.)

### **Different Kinds of Meetings**

There is the **Annual General Meeting** ; then we have the **Statutory Meeting** for public companies **with share capital** ; and then we have what is known as Extraordinary General Meeting.

### **Annual General Meeting**

**Every** company, whether public or private, must hold, within 18 months from the date of its registration, and thereafter once atleast in every calendar year within 15 months from the date of the holdings of the last Annual General Meeting, a meeting called the Annual General Meeting. If default is made, every director and manager of the company who is guilty of wilful default shall be liable to a fine. The Court can order the holding of the meeting if an application is made to it by any member of the company.

### **Statutory Meeting and Statutory Report**

**Excepting a private company**, a company limited by guarantee **and having a share capital**, or a company limited by shares alone, must **within not less than one month and not more than six months from the date at which it is entitled to commence its business**, hold a meeting called the **Statutory Meeting**.

At least 21 days before the holding of the Statutory Meeting, the directors must forward to every member of the company, a report called the **Statutory Report containing the following particulars** :—

- (1) The total number of shares allotted and the consideration for which the same have been allotted, distinguishing between shares which have been fully paid and those which have been allotted as partly paid, and in the case of partly paid shares, stating the extent to which they have been paid up. The Auditors of the company must have certified this part of the Return as correct, if it is correct, and such certificate must accompany the Return.
- (2) The amount received by the company and the payments made out of such amounts upto the date within 7 days of the date of the return exhibiting under different headings the receipts from shares and debentures and other sources and the payment made thereout, and particulars regarding the balance remaining with the company ; and the amount of preliminary expenses of the company disclosing commission or discount paid on the issue or sale of shares. This part of the Report must be certified by the auditors as correct, if really correct.
- (3) The total amount of cash received by the company for the shares allotted, certified as correct by the auditors.
- (4) The name, designation, description and address of each of the directors, managers and managing agents (if any), auditors, and of the secretary of the company, and if any changes have taken place since the date of the registration of the company, a mention of all such changes.
- (5) The extent to which underwriting contracts, if any, have been carried out

- (6) If any contract is to be modified, the particulars of such contract and of the modifications or proposed modifications.
- (7) If there are any arrears due on calls from directors, managers or managing agents, a statement regarding such arrears.
- (8) Particulars of any commission or brokerage payable for sale of shares to any director, manager or managing agent, or to a partner of the managing agent or of a director of a managing agent company if the managing agent is a private company.

The Statutory Report must be certified by atleast two directors of the company, or by the Chairman of the directors if authorised by the directors to certify the Report. A copy of the Report must be filed with the Registrar of Companies of the State concerned.

### Extra-ordinary General Meeting

An Extra-ordinary General Meeting may be called to do some urgent work which it may be thought not fit or convenient to leave till the holding of the annual general meeting. **Whenever the articles so provide**, the directors or the managing director or the manager may call an extra-ordinary general meeting. Even apart from the Articles, the members of the company have got the power given them under the Companies Act to call an extra-ordinary general meeting **by a requisition of theirs**. The requisitionists must be holders of **atleast one-tenth of the issued share capital** upon which calls and other dues have been paid. Such shareholders must state why they want an extra-ordinary general meeting and they must sign and deposit their requisition at the registered office of the company. The directors must within 21 days from the date of the requisition, call an extra-ordinary general meeting. If they fail or neglect to do so, the members, or a majority of them in value, can themselves call the meeting, and can charge the company all the expenses incurred by them in calling the meeting and sending the notices thereof to the members.

### Provisions regarding Meetings and Votes

**Unless a special resolution is to be passed at a meeting, a 14 days' notice in writing** must be given to all members entitled to be present at the meeting and to vote thereat. A longer notice is not disallowed. Where **all** the members entitled to be present and vote at the meeting agree to a lesser period's notice, the same shall be regarded as valid. The notice **must state the nature of the business to be transacted** at the meeting. If there is to be any special fact regarding the meeting, the same must be disclosed by the meeting.

Any **five** members present in person or by proxies, or **any** member or members **holding at least one-tenth** of the issued capital which carries voting rights, or the Chairman of the meeting, can demand a poll. But in a private company one member can demand a poll, if not more than seven members are actually present in person at the meeting, or, where more than seven members are present in person, then any two members can demand a poll. During a state of war, an alien enemy cannot vote at a meeting of a company. A shareholder whose name is entered on the Register of Members has the same rights as all other shareholders of the same class.

**Subject to any other provision made by the Articles**, every member shall have one vote in respect of each share or each hundred rupees of stock held by him, and in the case of a company without share capital every member shall have one vote. Voting shall take place by show of hands, the votes being counted by the chairman who presides at the meeting.

**Subject to the provisions of the Articles**, when a poll is demanded, the Chairman can, if allowed discretion by the Articles, require the poll to be taken at the meeting at which it is demanded or on some other day. At the poll, members have as many votes as are assigned to them by the Articles, and voting may be done in person or by proxy. The procedure described by the articles must be followed at the poll. Votes are usually given at the poll by writing on a piece of paper; the result is declared by the Chairman. If the members are equally divided the Chairman has a casting vote. A proxy must be appointed by an instrument in the form prescribed by the Articles; but if the instrument appointing the proxy does not comply with the Articles it cannot be questioned or declared void, provided it is in the form set out in regulation 67 of Table A.

For the validity of every meeting it is essential that there must be a requisite **quorum**. **Subject to the Articles**, any two members present in person can form a quorum at a meeting of a private company, and in the case of a public company any five persons can form a quorum.

### Resolutions

A Resolution may be (i) Ordinary, (ii) Extra-ordinary or (iii) Special.

#### Ordinary Resolution

It is a resolution by **any** numerical majority of the members entitled to be present and to vote at a meeting and actually present at a general meeting of a company. An ordinary resolution is sufficient wherever a special or extra-ordinary resolution is not expressly required.

#### Extra-ordinary Resolution

An extra-ordinary resolution is a resolution passed by the members of a company at a general meeting, **of which 14 clear days' notice was given** to the members entitled to be present and to vote at the meeting; the majority must be a **three-fourths majority** of the members present at a meeting and entitled to vote thereat.

An extra-ordinary resolution is required in the following cases :—

- (1) Removal of a director, who is not a permanent director, before the period of his office is due to be over ;
- (2) Voluntary winding up of a company if it cannot, by reason of its liability, continue its business except at a loss ;
- (3) Making any arrangements between a company about to be or in the course of being wound up and its creditors ;
- (4) For exercise of powers by voluntary liquidator in a members' voluntary winding up ;
- (5) Exercising certain powers under Section 234 of the Companies Act ;
- (6) Disposal of documents of the company under the Companies Act.

#### Special Resolution

It is a resolution passed by a **majority of not less than three-fourths** of the members entitled to vote at a meeting and to be present thereat **provided at least 21 clear days' notice specifying the intention to pass a special resolution**, was given to the members entitled to vote at the meeting. . . If **all** the members entitled to be present and vote at the meeting agree to any lesser period's notice, the same is valid.

A special resolution is required in the following cases :—

- (1) Change of name of company ;
- (2) Change of registered office from one State to another State ;
- (3) Alteration of the objects clause of the memorandum ;
- (4) Reduction of share capital ;
- (5) Alteration of Articles of Association ;
- (6) Creating Reserve Share Capital ;
- (7) Assigning of office by a director of a company ;
- (8) Making liability of directors or any of them unlimited ;
- (9) Appointment of inspectors for investigating into the affairs of a company ;
- (10) Winding up by an order of the Court, or voluntary winding up in cases other than the specified cases ;
- (11) Remunerating a managing agent otherwise than by a fixed percentage of the net annual profits ;
- (12) Authorising the liquidator of a transferor company to receive any compensation for transfer of shares, policies or other similar interests in the transferee company for distribution among members of the transferor company or for enabling him to enter into any other arrangement for participation in the profits of the transferee company.

### Clear Days

'Clear days' signify that the day on which notice of the meeting is given and the day on which the meeting is held are not to be counted in counting the number of days required for giving the requisite notice of a meeting.

### Statements, Books and Accounts, Inspection and Audit

#### Proper Books to be kept by every Company

Every company must have proper books of accounts kept prudently at its registered office or at such other place as the directors think fit ; such books must be kept open to inspection by the directors during business hours. Proper books of accounts must be kept with respect to (i) all sums of money received and spent by the company and the matters in respect of which such sums are received or spent ; (ii) all sales and purchases of goods by the company ; (iii) the assets and liabilities of the company.

#### Rights of Members to Inspect the Accounts

Regulation 105 in Table A, being a compulsory regulation applicable to every company, public or private, provides that the directors of a company must every year decide whether the accounts shall be kept open to inspection by the members, or not, and if so, at what place or places and at what time or times. The directors may decide in the negative. In such a case it is open to the members to set the matter before the shareholders of the company at the annual general meeting. If the directors have by their decision shut out the accounts from the members, the members can by a majority vote at their general meeting compel the directors to throw open the accounts to the members.

Wherever the right to inspect the accounts exists, the right to take copies and make extracts also exists. (*Nelson v. Anglo American Land Company*, 1897, 1 Ch. 130). Accounts may be examined through an agent, e.g., an Accountant. (*Dodd v. Amalgamated Marine Workers Union*, 1924, 1 Ch. 116).

**Books, Documents and Registers Required to be Kept at the Registered Office**

- (1) Register of Members.
- (2) Index of the Names of Members, unless the Register of Members is in an index form.
- (3) Annual List of Members and Summary contained in a separate part of the Register of Members.
- (4) Register of transfer of shares.
- (5) Duplicate or British (or Branch) Register, if any.
- (6) Register of Directors, Managers and Managing Agents.
- (7) Register containing particulars of Contracts or Arrangements in which directors are interested.
- (8) Minute Books of proceedings of meetings of directors and general meetings of the company.
- (9) Register of Mortgages and Charges.
- (10) Register of Debenture Holders.
- (11) A copy of every instrument creating the mortgage or charge.
- (12) Memorandum where the company is an undisclosed principal.
- (13) Proper books of accounts as required under section 130 of the Companies Act.
- (14) Copy of audited balance sheet, and profit and loss account or income and expenditure account, with a copy of the auditor's report thereon.

**Balance Sheet and Auditor's Report**

In the case of every company, it is incumbent on the directors, within eighteen months after the incorporation of the company, and thereafter once atleast in every calendar year, to lay before the members of the company in general meeting the balance sheet and profit and loss or income and expenditure account.

The balance sheet and profit and loss account or income and expenditure account must be audited by the auditors of the company, and the auditors must state whether or not the balance sheet discloses the true financial position of the company and whether or not it is drawn up in conformity with the requirements of the provisions of the Indian Companies Act. The Report of the auditors on the Balance Sheet must be attached to the Balance Sheet and Profit and Loss Account or Income and Expenditure Account, as the case may be, or else a reference must be made to the Report by a foot note.

A public company must send a copy of the balance sheet and profit and loss account or income and expenditure account, with the auditor's report thereto to every member of the company at his registered address at least fourteen days before the holding of the meeting. A copy must also be deposited at the registered office at least fourteen days before the meeting. Three copies of the balance sheet must, in the case of a public company, be filed with the Registrar of Companies after it has been laid before the company in general meeting. In the case of insurance companies, four printed copies have got to be filed with the Controller of Insurance.

A private company need not file any copy of its balance sheet with the Registrar of Companies; nor is it bound to supply copies free of charge when requested by its members so far as the balance sheet and profit and loss account or income and expenditure account is concerned. But if a member is ready and willing to pay (and shows his ability to pay) the fee at a rate not exceeding six annas for every hundred words or fractional part thereof, and demands a copy of the balance sheet and profit and loss account or income and expenditure account, he is entitled to be supplied by the company with such copy.

**Contents of the Balance Sheet**

The Balance Sheet must contain a summary of the property and assets and of the capital and liabilities of the company, disclosing such particulars as will give the real nature of the liabilities and assets, showing how the value of the fixed assets has been arrived at. The Balance Sheet must be, as far as possible and practicable, in Form 'F' which is given as follows :—

**FORM F.**

(See Section 132).

.....LIMITED

Balance Sheet as at.....19..

CAPITAL AND LIABILITIES.		PROPERTY AND ASSETS.	
Capital—		Fixed Capital Expenditure—	
Authorised Capital.....shares of Rs.....each		(Distinguishing as far as possible between expenditure upon goodwill, land, buildings, leaseholds, railway sidings, plant, machinery, furniture, development of property, patents, trademarks and designs, interest paid out of Capital during construction, etc., and stating in every case the original cost and the additions thereto and deductions therefrom during the year, and the total Depreciation written off under each head. Where sums have been written off on a reduction of capital or a revaluation of assets every balance-sheet after the first balance-sheet subsequent to the reduction or revaluation shall show the reduced figures, with the date of and the amount of the reduction made.)	
Issued Capital.....shares of Rs.....each		Preliminary Expenses .. .. .	
(i) Shares issued as fully paid up pursuant to any contract without payments being received in cash.....shares of Rs.....each		Commission or Brokerage .. .. .	
(ii) Shares issued for payments in cash.....shares of Rs.....each		(Commission or Brokerage paid for underwriting or placing or subscribing shares or debentures until written off.)	
Subscribed Capital.....shares of Rs.....each			
Amount called up at Rs.....per share			
Less—Calls unpaid—			
(i) due from Managing Agents .. .. .			
(ii) due from others .. .. .			
Add—Forfeited shares (amount paid up.)			

CAPITAL AND LIABILITIES.		PROPERTY AND ASSETS.	
<b>Note.</b> —Where circumstances permit, issued and subscribed capital and amount called up may be shown as one item, e.g., Issued and Subscribed Capital..... shares of Rs.....each .. .. .		<b>Discount Allowed</b> on the issue of shares or so much as has not been written off at the date of the balance-sheet .. .. .	
Ra.....paid up .. .. .		<b>Stores and Spare Parts</b> .. .. .	
<b>Reserves</b> .. .. .		<b>Loose Tools</b> .. .. .	
<b>Debentures</b> stating the nature of security .. .. .		<b>Live-Stock and Vehicles</b> .. .. .	
<b>Any Sinking Fund</b> .. .. .		<b>Stock in Trade</b> .. .. .	
<b>Any other Fund Created out of Net Profits</b> , including any development fund.. .. .		(Stating mode of valuation, e.g., cost or market value) .. .. .	
<b>Any Pension or Insurance Fund</b> .. .. .		<b>Bills of Exchange</b> .. .. .	
<b>Provision for Bad and Doubtful Debts</b> .. .. .		<b>Book Debts</b> .. .. .	
<b>Loans—</b>		(Distinguishing between those considered good and in respect of which the company is fully secured and those considered good for which the company holds no security other than the debtor's personal security, and distinguishing between debts considered good and debts considered doubtful or bad. Debts due by directors or other officers of the company or any of them either severally or jointly with any other persons to be separately stated).	
(a) Secured—		<b>Advances</b> .. .. .	
(i) loans on mortgages or fixed assets .. .. .		(Recoverable in cash or in kind or for value to be received, e.g., Rates, Taxes, Insurance, etc., showing separately—	
(ii) loans on debentures .. .. .		(i) loans given to subsidiary companies .. .. .	
(iii) loans from banks, stating the nature of security .. .. .		(ii) loans including temporary advances made at any time during the year to directors or managers of the company.	
(iv) liabilities to subsidiary companies .. .. .			
(v) other secured loans, stating the nature of security .. .. .			
(vi) interest accrued on mortgages, debentures or other secured loans .. .. .			
(b) Unsecured—			
(i) loans from banks .. .. .			
(ii) fixed deposits .. .. .			
(iii) short-term loans .. .. .			
(iv) advances by directors or managers and managing agents .. .. .			
(v) interest accruing but not due and interest accrued and due .. .. .			
(vi) Liabilities to subsidiary companies .. .. .			



CAPITAL AND LIABILITIES.		PROPERTY AND ASSETS.	
Unclaimed Dividends .. .. .	.. .. .	Investments .. .. .	.. .. .
Liabilities—		Showing nature of investments and mode of valuation, e.g.,	
For Goods supplied .. .. .	.. .. .	Cost or Market value and distinguishing—	
For Expenses .. .. .	.. .. .	(i) investments in Government or trust securities .. .. .	.. .. .
For Acceptances .. .. .	.. .. .	(ii) investments in shares, debentures or bonds	.. .. .
For Other Finance .. .. .	.. .. .	(showing separately shares fully paid up	.. .. .
		and partly paid up) .. .. .	.. .. .
Advance payment and unexpired discounts .. .. .	.. .. .	(iii) investments in shares, debentures or bonds of	.. .. .
(For the portion for which value has still to be given,		subsidiary companies .. .. .	.. .. .
e.g., in the case of the following classes of companies—		(iv) Immovable properties .. .. .	.. .. .
Newspaper, Fire Insurance, Theatre, Club, Banking,			
Steamship Companies, etc.) .. .. .	.. .. .	Interest accrued on Investments .. .. .	.. .. .
Profit and Loss .. .. .	.. .. .	Cash and other Balances .. .. .	.. .. .
Contingent Liabilities		Amount in hand .. .. .	.. .. .
Claims against the company not acknowledged as		Balances with Agents and Bankers in detail showing	.. .. .
debts .. .. .	.. .. .	whether on deposit or current account, etc. .. .. .	.. .. .
Money for which the company is contingently liable .. .. .	.. .. .	Profit and Loss .. .. .	.. .. .
(Showing separately the amount of any guarantees			
given by the company on behalf of directors or			
officers of the company.) .. .. .	.. .. .		
Arrears of Cumulative Preference Dividends .. .. .	.. .. .		

[The information required to be given under any of the item or sub-items in this Form if not included in the Balance-Sheet itself shall be furnished in a separate Schedule or Schedules to be attached to and to form part of the Balance-Sheet.]

The Balance Sheet must include particulars regarding the subsidiary companies also. If a company which is a public company does not adopt the balance sheet, a statement must be filed with the balance sheet and annexed to it, the idea being that of informing the Registrar of the fact.

## AUDITORS

### Qualifications and Appointment of Auditors

The auditor of a public company, or of a private company which is not the subsidiary of a public company, must be a Chartered Accountant whose name has been enrolled by the Institute of Chartered Accountants of India. But in a private company not subsidiary of a public company, any person otherwise qualified as auditor can act as its auditor.

Excepting the case of a private company which is not the subsidiary of a public company, a company cannot have as its auditor a person in the employ of a director or officer of that company. Any person who is indebted to the company cannot be its auditor. A director or officer of the company or a partner of such director or officer cannot be the auditor.

**As a rule** directors cannot appoint auditors. Auditors are appointed by the members of the company at each annual general meeting to hold office till the next annual general meeting at which they may be re-appointed by the members of the company. If no auditor is appointed at the annual general meeting, any member of the company may apply to the State Government for appointment of an auditor, and the State Government may then appoint an auditor for the current year and may fix his remuneration which the company would be bound to pay. The filling of a **casual** vacancy in the office of an auditor may be done by the directors who may then fix the auditor's remuneration also. The **first** auditors of a company can also be appointed by the directors before the holding of the statutory meeting. Such first auditors hold office till the holding of the first annual general meeting unless removed by the members at the statutory meeting or at any extra-ordinary general meeting.

A person other than a retiring auditor cannot be appointed auditor at the annual general meeting unless notice of the intention to appoint him as an auditor had been given to the company by a member at least fourteen days before the holding of such general meeting, and unless the company has sent a copy of such notice to the retiring auditor and has also given notice to its members by advertisement or by any other mode laid down by the articles at least seven days before the holding of the annual general meeting.

### Remuneration of Auditors

The remuneration of auditors is fixed by the members at the annual general meeting. But the remuneration of the first auditors or of auditors appointed to fill a casual vacancy is fixed by the directors who made the appointment.

## POWERS AND DUTIES OF AUDITORS

### Powers

- (1) Auditors can examine the books of accounts and vouchers and ask for such information and explanation as may be necessary for a proper audit. (The case of the London and General Bank; 1895 2 Ch. 673.)
- (2) Auditors are, in a sense, agents of the shareholders or members of the company. They are agents because they are appointed by the members and it is their first and foremost duty to protect the interest of the appointers, the members, and to inform them of the true financial position of the company's affairs. **It is their primary duty to find out whether the balance sheet is a fair and correct representation of the affairs of the company or whether it conceals something or shows any illegality.** When they find any ultra vires payments made or any unwarranted acts done, it is their **duty to report the facts to the shareholders.** (Speckman v. Evans, 1868, L.R. 3 H.L. 171).

- (3) They can examine vouchers, receipts, and other books and documents kept by the company.
- (4) They have the power to attend any general meeting of the company at which any accounts examined by them are to be laid before the members so that they can explain any matter with regard to the accounts audited by them. They are entitled to notice of such meetings.

### Duties

- (1) It is the duty of auditors to report to members on the accounts **examined** by them **and to find out whether all the books have been properly kept**. They must report on every balance sheet and profit and loss account laid before the members of the company during their office. In their report they must state whether or not all the information and explanations required by them were obtained by or supplied to them and whether or not in their opinion the balance sheet and profit and loss account or income and expenditure account are drawn up as required by the law and whether or not the same exhibit a true and correct view of the company's affairs. If any of these matters be answered in the negative or with any qualification or modification, the reason for such answer must be included in their report.
- (2) It is their duty to examine the books of the company **not only in the light of their arithmetical accuracy, but in the light of facts and figures, vouchers, receipts and other necessary evidence**. In other words they must **find out** whether the books have been **properly kept or not** and whether the books contain matter **substantiated by documents or not**. (London and General Bank case, 1895, 2 Ch. 673.)
- (3) They must be honest and careful. If there is anything to arouse their suspicion, they must be on the alert and must exercise greater care than what they would have if their suspicion had not been aroused. As humourously pointed out by Lord Justice Lopes in the Kingston Cotton Mills case, (1896), 2 Ch. 279, "an auditor is a watch dog and not a blood hound". He is the watch dog of the shareholders in so far as the shareholders have appointed him to diligently and vigilantly report to them what the true financial affairs of the company are and whether any ultra vires transactions have been entered into on behalf of the company. But they are not supposed to be blood hounds or detectives. They are not justified in or required to see everything with an eye of suspicion without there being any reasons for that, or with a foregone conclusion that something is wrong. They are justified in trusting the honest servants of the company. Where, however, their suspicion is aroused they must be alert and either dive deep into the matter and probe to the bottom or else give up the audit. So when their suspicion is aroused they have to play the detective or the bloodhound.
- (4) An auditor is not an adviser. He has got nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of the company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether the dividends are prudently or imprudently declared, provided he discharges his own duties to the shareholders." (per Lindley L. J. in re London and General Bank, 1895, 2 Ch. 673). But where an **improper** payment of dividends has been caused by an auditor's breach of duty, he is liable for the amount improperly paid; he is as much liable as the directors. (London and General Bank, *Ibid.*)
- (5) An auditor is not an insurer, for he **does not guarantee** the accuracy of the accounts examined by him, and provided he has exercised reasonable skill,

- diligence and care, he can be said to have discharged his legal and equitable duties, and cannot be held liable. (London and General Banks' case.)
- (6) Auditors are not valuers or advisers. It is no duty of an auditor to be a valuer or adviser, but when the company's assets are **dishonestly** valued or **grossly exaggerated**, it becomes the duty of the auditor to inform the members that the balance sheet does not represent the true position of the affairs of the company. If the auditor finds that the assets are **substantially** over-valued, he should reveal the fact to the members. (London and General Bank).
  - (7) Auditors must make themselves thoroughly aware of the Articles of Association of their company. (In Re: Republic of Bolivia Exploration Syndicate 1914, 1 Ch. 139.)
  - (8) It is their duty to communicate any concealment in the balance sheet so that the shareholders may know the fact. "The key note of a balance sheet is information and not concealment". (Shamdasani v. Sir S. Pochkhanawalla, 29 Bom. L. R. 722.)
  - (9) Auditors are bound to make personal inspection of the place where the valuable securities of the company are kept. Brokers, however reputable, are not proper persons to keep the custody of the company's valuable securities except for a **short** period when it becomes **necessary** to keep the securities with them. The proper persons are a safe deposit vault or a Bank or a company's strong room or safes. (In City Equitable Insurance Co.'s case, 1925, 1 Ch. 407).
  - (10) A bit of '**window dressing**', i.e., polishing up matters and showing the assets of the company **a little more** than what they really are need not be reported by the auditors to the shareholders. (The opinion of Mr. Morgan, Chartered Accountant, London, reported by the learned writer Rustomji in his Company Law). But if the window dressing ceases to be window dressing and amounts to substantial exaggeration so as to be equivalent to falsehood or mis-representation, the auditors must report the fact to the shareholders.
  - (11) With regard to bad and doubtful debts of a banking company, the law is that these debts need not be disclosed in the balance sheet provided due provision for such debts has been made by the company. It is the duty of the auditors to satisfy themselves that such provision has been made by the company. (Shamdasani v. Pochkhanawalla, 29 Bom. L. R. 722).
  - (12) With regard to Secret Reserves, no definite rule or law has yet been laid down; the Bombay High Court has expressed an opinion, in Shamdasani v. Pochkhanawalla (29 Bom. L.R. 722), that if any part of the secret reserve is availed of to meeting bad and doubtful book debts, it must be revealed in the balance sheet and not concealed. In Lord Kylsant's case (1932, 1 K.B. 422), it was said: "If the account on which dividends are to be paid or the account on which the current expenses of the company are to be made, is being fed by undisclosed reserves, it seems to me very difficult to see how the auditor can discharge his duty of giving a true and correct view of the state of the company's affairs". "A very heavy or a very long, protracted utilisation of the secret reserves, in order to keep the company going is a serious matter which should be disclosed to the company."

### Relief from Liability

Under section 281 of the Companies Act, when any auditor who pleads guilty of negligence, breach of duty, technical breach of trust, but prays that he has acted honestly, justly and fairly on the whole, and that he should be excused wholly or in part, the Court may excuse him wholly or partly, if it thinks fit, and upon such conditions as it may think fit to impose. In such a case if any indemnity is provided by the company's articles or by any contract or by any resolution of the company, such indemnity to the auditor against the expenditure incurred by him in his application under section 281, is valid. Similarly, such indemnity is valid also for compensating the auditor in case he has been prosecuted or sued and has won the case by being acquitted or by judgment having been given in his favour.

## **INVESTIGATIONS OF AFFAIRS OF COMPANIES BY THE REGISTRAR, BY INSPECTORS ; AND INSTITUTION OF PROSECUTIONS**

### **Power of Registrar to call for Information or Explanation**

If with regard to any document which is to be forwarded to the Registrar, further particulars are required by him, he may, by an order in writing, require the company to furnish such explanation in writing as he may think fit to require. If any officer of the company, having the necessary information, does not furnish it, the Registrar may apply to the Court which may order the company to produce before him such documents as the Court may think fit. If the required information or explanation is not furnished within the time specified by the Registrar or if the Registrar is not satisfied with the information or explanation that is furnished, the Registrar must report in writing the circumstances of the case to the Central Government (in practice the State Government), and the Government may thereupon appoint a competent Inspector or Inspectors to investigate into the affairs of the company and to report thereon in such manner as the Government may require. The inspectors are entitled to call upon the company to produce before them all books and documents in the company's possession and power which they think necessary for the investigation. On the conclusion of the investigation, the inspector or the inspectors, as the case may be, must report to the State Government which must then forward a copy of the report to the registrar and a copy also to the company at its registered office.

If from such report made by the inspectors, the Government thinks that any person has been guilty of an offence in relation to the company for which he is criminally liable, it must report the matter to the Advocate General or the Public Prosecutor, who, if he thinks fit, may get the person concerned prosecuted. But if this officer thinks that there is no *prima facie* case made out, the matter will end there. If the accused, that is, the director, manager or other officer of the company, be found guilty, he shall, unless the Court otherwise grants leave or orders, be disqualified for five years for holding the office of a director, manager or other officer of the company ; he cannot take part in any manner whatsoever in the affairs of the company.

### **Investigation by the Registrar**

If any creditor or contributory of a company alleges before the registrar that the business of the company is carried on fraudulently or in fraud on its creditors or on persons dealing with the company or is for a fraudulent purpose, the registrar of companies may, after giving the company, by written order, an opportunity of being heard, require the company to provide such information and explanation as he may require and specify in the written order served on the company. On the receipt of such order by the company, the officers of the company who possess the necessary information must furnish it to the registrar within the time specified in the registrar's order. If any such officer refuses or neglects to furnish such information or explanation, he shall be liable to a fine not exceeding fifty rupees for each offence. The Court may also compel the company to furnish such document as may reasonably be required by the registrar for his inspection and for investigation by him. If information or explanation required by the registrar is not furnished within the time specified by the registrar, or if the registrar is not satisfied with the information or explanation or with any document produced before him, he must report in writing to the State Government, which may appoint inspectors to investigate into the matter. But if the registrar is satisfied, after investigation, that any representation by the creditor or the contributory, made to him, on the strength of which he has taken up the investigation, is frivolous or vexatious, he shall disclose the identity of the informant to the company.

### **Investigation by Inspectors in other Cases**

In the case of a banking company having a share capital, on an application made by its members holding at least one-fifth of the issued share capital, inspectors can be appointed. In the case of a company other than a banking company, with a share capital, inspectors may be appointed if an application is made by the members who are holders of at least one-

tenth of the issued share capital. In the case of a company without any share capital, inspectors may be appointed if at least one-fifth in number of the persons whose names are on the Register of Members apply for such appointment.

### **Power possessed by Companies to appoint Inspectors**

A company may, **by a special resolution**, appoint inspectors to investigate its affairs. If the members of the company suspect anything wrongful with regard to its affairs, they may appoint inspectors, by passing a **special resolution** to that effect. An ordinary resolution is not sufficient.

Inspectors so appointed by the company have the same powers and duties as inspectors appointed by the State Government with this difference however, that while inspectors appointed by the Government have to report to the Government, the inspectors appointed by the company have to report to such persons as the company in general meeting may direct. The members may also lay down the mode in which the inspectors must report. Where inspectors are appointed not by a special resolution, but by a general resolution, the inspectors so appointed shall not have the drastic powers possessed by the inspectors appointed by special resolution. (*Vakil v. Radio Club*, 1945, 47 Bom. L. R. 428). All officers of the company are bound to help inspectors and to produce before them the necessary documents and to give evidence on matters relating to the affairs of the company within their knowledge, information and power. A director or officer of a company is not justified in refusing to answer any question put to him by the inspectors merely on the ground of the presence of a shorthand writer of the inspector, in so far as such writer is necessary for taking the record of the proceedings. (*In Gaumont British Picture Corporation Limited*, 1940, Comp. Cas. 250). A copy of the inspector's report is admissible in any legal proceedings as evidence of the inspector's opinion regarding any matter contained in the report, provided the copy is authenticated by the Seal of the company whose affairs have been investigated.

### **ALTERNATIVE REMEDY TO WINDING UP IN CASES OF MISMANAGEMENT OR OPPRESSION**

#### **Power of the Court to act and make Orders when Company acts in a prejudicial manner or oppresses any of its Members [Sec. 153 C.]**

Apart from any other legal action that may be taken under the Companies Act, or otherwise, any aggrieved member of a company may apply to the Court for the setting of matters right, when the affairs of the company are being conducted in a manner prejudicial to the company or in a manner oppressive to some of its members (including the aggrieved member.) Section 153 C gives the power to the Court having the jurisdiction to rectify matters and make such just and fit orders as may be found expedient by the Court. To enable an application to the Court under Sec. 153 C, the member, complaining or wishing to present an application, must be the holder of at least one-tenth of the issued share capital of the company upon which all sums due and calls have been fully paid up; or else the application can be made by a member with the written assent, in that behalf, of at least one hundred members of the company or with the written assent of one-tenth of the total number of members of the company, whichever is less. In the case of a company not having any share capital, the application can be made by any aggrieved member with the written assent (in that behalf) of at least one-fifth of the total number of members, and where several persons have the same interest in the application any one or more of, them may, with the permission of the Court, make the application on behalf of, or for the benefit of, all the persons so interested. Such an application may also be made by the Central Government if it is satisfied that the affairs of the Company are being carried on in a prejudicial manner or in a manner oppressive to some of the members of the Company. If on any such application the Court is of the opinion that the company's affairs are being conducted in a manner prejudicial to the Company or its members or any of its members and that to wind up the company would unfairly and materially prejudice the interests of the company or any of its members, but that otherwise the facts would justify the making of a winding-up order on the ground that it is just and equitable to wind up the company, the Court may, with a view to rectifying matters and putting an end to the abuses, make such order or orders as it may think fit and

expedient to make. Section 153 C is in general terms and gives the Court vast powers of passing any orders as may be found fit or expedient. For example, the Court may provide for : (1) the regulation of the conduct of the company's affairs ; (2) the purchase of the shares or interests of any members of the company by any other member or members of the company or by the company itself ; (3) the reduction of the capital of the company consequential to a purchase of shares or other interest in the company by the company itself ; (4) the termination of any agreement (howsoever arrived at) between the company and its manager, managing agent, managing director or any of its directors.

When an order of the Court under Section 153 C makes any alteration in, or addition to, the memorandum or articles of association of the company, then, subject to the provisions of the order of the Court, the company cannot, without the leave of the Court, make any further alteration in, or addition to, the memorandum or articles inconsistent with the alteration or addition effected under the order of the Court. A certified copy of the Court's order altering or adding to, or giving leave to alter or add to, the memorandum or articles, must, within fifteen days after the making thereof, be delivered by the Company to the Registrar of Companies for registration ; for default the company and every officer of the company guilty of default is punishable with fine which may extend to five thousand rupees.

Before a final order is made by the Court, it is open to the Court to make any interim order as may be felt necessary or fit.

Where the Court makes an order terminating any agreement between the company and its managing agent or managing director or any of its other directors, as the case may be, the Court may, if it appears to it that the managing agent, managing director or other director, as the case may be, has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of misfeasance or breach of trust in relation to the company, award as damages against the managing agent, managing director or other director, as the case may be, such sum of money as the Court may think fit ; and in such a case the provisions of sections 235 and 236 of the Companies Act shall apply as if the company were in the course of a winding-up and as if proceedings under Section 235 had been commenced by a contributory within the time limit prescribed by that section.

#### **Effect of Termination of Managing Agency Agreement, etc. [Sec. 153 D.]**

Where the Court's order under section 153C terminates any agreement between the Company and its manager, managing agent, managing director or other director, as the case may be, the manager, managing agent, managing director or other director, as the case may be, shall **not** be entitled to bring any suit, or to claim, for damages or compensation for loss of office or otherwise, whether the claim is made in pursuance of the agreement or otherwise. Nor shall the Court's order give rise to any claim on the part of or by any other person for damages or compensation for the termination or revision of any other agreement. In such a case, no manager, managing director, director, or managing agent or any associate of such managing agent, shall, without the leave of the Court, be appointed or reappointed or be entitled to act as the manager, managing director, director or managing agent, as the case may be, for a period of five years from the date of the Court's order. Unless a notice of the party's intention to apply for leave of the Court has been served on the Central Government, no Court shall grant the leave. "Associate of a managing agent" means any firm of which the managing agent is a partner; or any partner of the managing agent firm ; or any private company of which the managing agent is a member, director, manager or managing agent ; or if the managing agent be a company then any subsidiary company of the managing agent, any director, managing agent or manager of the managing agent or any subsidiary company of the managing agent ; or if the managing agent is a private company any director or member thereof.

#### **Power of the Central Government to appoint Advisory Commission and to make Rules in respect of certain matters [Sec. 289B]**

For advising the Central Government on the desirability or otherwise of granting leave in matters relating to change of controlling authority, alteration of memorandum or articles

affecting managing agent's appointment, remuneration, duration of office, change in the constitution of managing agents, appointment of managing director or other director not liable to retire by rotation, increasing of the remuneration of managing director or other director not liable to retire by rotation, etc. the Central Government is empowered to appoint and constitute a Commission consisting of not more than three persons with suitable qualifications and to appoint one of them to be the Chairman of the Commission. It is the duty of the Commission to enquire into, and to advise the Central Government on, all applications (for approval) made to the Central Government in matters already referred to in the preceding paragraph. For enabling it to make a proper inquiry, the Commission is entitled to require the production before it of any books or other documents in the possession of the company relating to any matter relevant to the inquiry which the Commission has got to conduct before advising the Government. The Commission can call for further information or explanation as it may think necessary. The Commission can, with such assistants as may be necessary, inspect any books or other documents and may make copies or extracts therefrom. The Commission may examine on oath a managing director or any other officer of the Company relating to any matter under its inquiry, and may administer the oath accordingly to the person sought to be so examined. If any person refuses or neglects to produce any book or other document in his possession or custody which he is required by the Commission to produce before it or to answer any question put to him relating to any matter under inquiry, he shall be punishable with imprisonment for a term which may extend to two years and shall also be liable to fine.

### Immunity

No suit or other legal proceeding can lie against the Central Government, the Commission, or any member of the Commission, in respect of any thing done in good faith or intended to be done in good faith in pursuance of Section 289B or the other relevant sections or in respect of any Rules or Orders made under the authority of those sections.

### Enforcement of Submission of Returns and Documents to the Registrar.

Where a company has defaulted in filing with the Registrar or in sending to him any account, document, notice or other return, and the default is continued for a period of fourteen days after the receipt by the company of the notice served by the Registrar asking that the default be made good, the registrar or any member or creditor of the company may apply to the Court that the company and/or any officer of the company may be ordered to make good the default, and the Court may, on such application, order that the default be made good within such time as it may specify. The company or any officer of the company responsible for the default may be ordered by the Court to pay the cost incurred by the applicant.

### Conversion of Private Company into Public Company and Vice Versa

A private company can be converted into a public company, **by a special resolution altering the articles** so as to remove all or any of the restrictions imposed by the Act on private companies, and by filing with the Registrar of Companies a prospectus or statement in lieu of prospectus. A copy of the special resolution altering the articles must, within fifteen days of the passage thereof, be filed with the registrar. Other provisions in the articles should also be altered so as to bring them in conformity with the requirements of the law relating to public companies. For example, if the company had only two directors while it was a private company, it must now have at least three directors. It may also alter the articles so as to get the powers relating to the issue of share-warrants to bearer which were not possessed by the company while it was a private company.

Where it is stated by the memorandum of association of the company that it, being a private company, cannot be converted into a public company, the articles cannot be altered even by a special resolution (*Ashbury v. Watson*, 1885, 30 Ch. D. 376). It is otherwise if such condition is in the articles.

A public company can be converted into a private company **by a special resolution altering the articles so as to restrict the right to transfer shares and so as to restrict**



**the number of members to 50 and by prohibiting any invitation to the members of the public for shares or debentures.** A copy of the special resolution must be filed with the registrar of companies within fifteen days from the date of its passage. The articles should also be brought into conformity with the other requirements of the Act relating to private companies, e.g., if the articles had provided for issue of share-warrants to bearer, such power must now be taken away, because a private company cannot issue share warrants to bearer.

### **Consequences of Non-Compliance with the Provisions of the Act relating to Restrictions on Private Companies by its Articles**

If a private company having its restrictions by its articles, does not actually abide by such restrictions, it ceases to be a private company and automatically assumes the character of a public company, with the result that its exemptions and privileges enjoyed by it as a private company are now lost, and it will have to file the necessary documents, including three copies of the balance sheet, with the registrar of companies.

A company which issued to the public prize bonds in the nature of debentures was held to have ceased to be a private company, and had to file a copy of the balance sheet and profit and loss account with the registrar. (*Bharmanji v. Emperor*, 1946, 16 Comp. Cas. 31).

### **Privileges and Exemptions Conferred on Private Companies**

The following are the privileges and exemptions enjoyed by private Companies :—

- (1) The number of its members need not be at least seven ; it may have only two members.
- (2) No director is necessary for a private company provided it is not the subsidiary of a public company.
- (3) The restrictions relating to the appointment and advertisement of directors do not apply to private companies.
- (4) Voting by interested director is not prohibited in the case of a private company not being the subsidiary of a public company.
- (5) Section 91 D of the Act which applies to public companies and which provides that where any contract is made by any agent or manager of a company on behalf of the company which is an undisclosed principal, a memorandum of the contract must be filed with the office of the company, does not apply to any private company which is not the subsidiary of a public company.
- (6) The provisions of the Act relating to the commencement of business, the exercise of borrowing powers and the necessity of obtaining the certificate of commencement of business do not apply to private companies;
- (7) A private company need not file any copy of its balance sheet with the registrar of companies.
- (8) It is not necessary for a private company to file any statement in lieu of prospectus.
- (9) No statutory meeting is required for a private company ; nor does the question of filing the statutory report at all arise.
- (10) It is not necessary for a private company to send any copy of its balance sheet and profit and loss account or income and expenditure account, with a copy of the auditors report thereon, to its members. But if a member of a private company wants to have from its company any copy of the balance sheet and profit and loss or income and expenditure account, he can have the same by paying for it at a rate of not more than six annas for every 100 words or fractional part thereof required to be copied. If this payment is forthcoming or is tendered the company is bound to furnish the required copy or the required extract.

- (11) The auditor of a public company or of a private company which is the subsidiary of a public company must be a Chartered Accountant. In case, however, of a private company which is not subsidiary of a public company any accountant (who possesses any other qualifications or experience as such and who is not a Chartered Accountant) may be an auditor of the company. So also a person in the employment of a director or officer of the company may be an auditor of such a private company not being the subsidiary company of a public company.
- (12) Holders of preference shares and debentures of a company are not entitled to receive and inspect the balance sheet and profit and loss accounts of the company and the auditor's report and other reports.

### **Carrying on Business with less than Legal Minimum of Members**

Where a company's members falls below the legal minimum of two, in the case of a private company, or below seven, in the case of a public company, the liability of each member will be **unlimited liability if he knowingly continues** to be a member after the number so fell below the legal minimum, for all the debts of the company **contracted after the lapse of six months from the date the number so fell below the legal minimum.**

### **Companies Registered Outside India**

A company registered outside India is required to file with the registrar in the state in which it does business in India, the following documents :—

- (1) The certified copy of the Charter, Statute or Memorandum and Articles of the company, or other instrument, stating or defining the constitution of the company; if the instrument is not in the English language, a certified translation of it ;
- (2) The full address of the registered or principal office of the company outside India ;
- (3) A list of directors and managers, if any, of the company ;
- (4) The name and the address of some person resident in India and authorised to accept on behalf of the company, service of legal process and notices required to be served on the company ; and the full address of that office of the company in India which is deemed to be the principal place of business of the company in India ; and if and when there is any alteration in any instrument required to be filed with the registrar, or in any address or in the directors and manager's personnel or in any name or address of the person authorised to accept service of legal process ; and the notice of any such alteration.

The Company must also file with the registrar of the state in which it has its principal place of business, three copies of its balance sheet, if the balance sheet is by the law of the foreign country where it is situated required to be filed with the public authority in that foreign country. Where by the law of the country where it is incorporated the company is not required to file any copy of the balance sheet with the registrar or the public authority in that foreign country, it must file in triplicate a statement in the form of a balance sheet in Form "F." When such company uses as part of its name the word "Limited," it shall, in every prospectus issued by it in India, state the name of the country of its incorporation and show at every place where it carries on business, the name of the company and of the country in which its is incorporated, in letters easily legible in English characters, and, where the company does business beyond the local limits of the ordinary original civil jurisdiction of a High Court, the name must be in one of the vernacular languages in use in that place. The name of the company and of the country in which it is incorporated must also be mentioned in legible English characters on all bill-heads and letter papers of the company and in all notices, advertisements and other publications of the company.

In the case of a foreign company, it is not lawful for any person to issue, circulate or distribute in India any prospectus offering for subscription shares or debentures, unless before the issue, circulation or distribution of the prospectus, a copy of it, certified by the Chairman and two other directors of the company as having been approved by a resolution of the managing body has been delivered to the registrar, and unless the prospectus states on the face of it that a copy of it has been so delivered to the registrar, and unless it is dated. In the case of a foreign company canvassing of shares from house to house is prohibited; the word 'house' does not mean or include an office used for business purposes.

### Registration of Joint Stock Companies under Section 255

A joint stock company is a company which has a permanent paid up or nominal share capital of a fixed amount divided into shares of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other person.

The following conditions have to be fulfilled before a joint stock company can be registered in pursuance of part VIII of the Act :—

- (1) A list containing the names, addresses and occupations of all persons who, on a day mentioned in the list not being more than six clear days before the day of registration, were members of the company, and showing the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number, must be delivered to the registrar.
- (2) A copy of the Act of Parliament, Indian Law, Royal Charter, Letters Patent, Deed of Settlement, Contract of Co-partnership or other instrument constituting or regulating the company, must be delivered to the registrar. If the company is being registered as a limited company, a statement containing particulars as to the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists, the number of shares taken and the amounts paid on each share, the name, of the company with the word "Limited" being the last word in its name and if the company is limited by guarantee a resolution mentioning the amount of the guarantee must be delivered to the registrar.

### Defunct Companies

A defunct company is a company which is not functioning or doing any business. Such a company can be removed from the Register of Companies and then dissolved without any winding up.

If it is shown to the Registrar on reasonable grounds, that a company is not doing business or that it is not in operation, the registrar must send to the company by post a letter inquiring whether it is carrying on business or is in operation. If the registrar does not receive any reply to this letter within one month after the sending of the letter, he must within fourteen days after the month is over send to the company by post a **registered letter making therein a mention of the first letter and that no answer has been received thereto**. The registered letter must also state that if no answer is received to it within one month from its date, a notice shall be inserted in the Official Gazette and steps shall be taken to strike out the name of the company. If the registrar then gets a reply that the company is not in operation or is not carrying on business, or if the registrar does not within one month after the sending by him of the registered letter receive any answer, he may publish the notice, in the Official Gazette, to the effect that after three months from the date of the notice the name of the company shall, unless cause is shown to the contrary, be struck off the Register and the company shall be dissolved. A notice to this effect must also be sent to the company. After the expiration of the period mentioned in the notice the registrar may, unless cause to the contrary is shown by the company, strike its name off the Register, and shall publish notice of the fact in the Official Gazette, and thereafter the com-

pany shall be dissolved. Even after such dissolution, the liability, if there be any, of every director and member of the company shall continue and can be enforced as against any director or member as if the company had continued to exist. The Court may, on the application of the company or any of its members or creditors, order that the name of the company be replaced on the Register of Companies, if the Court is satisfied that at the time the name of the company was taken off the Register it was carrying on business or was in operation or that it is otherwise just and fit to restore to the Register the name of the company. If the name of the company is so ordered to be restored to the Register of Companies, the company's existence shall be deemed to have continued, as if its name had not been struck off, subject to such directions as the Court may make. (Brown Steel Works, 1905, 21 T.L.R. 374).

The registrar has got the power to strike the name of a company off the Register of Companies, but the registrar is not bound to do so. If an application is made to the registrar for removal of a company from the Register, with the deliberate intention of avoiding liability of the company in a suit against it, the application must be rejected by the registrar; but if it is not rejected by the registrar, the Court may set aside the registrar's order, if an application is made to the Court to that effect by an aggrieved party. (Das v. Chhaba Cotton Co., 1925, Lah. 443). A company which is not in the course of a winding up is deemed to be a company still in operation within the meaning of Section 247 of the Act (which section deals with defunct companies). (Langlagate Co., 1912, 28 T.L.R. 529).

## WINDING UP (LIQUIDATION)

### Meaning of Winding up or Liquidation

The winding up or liquidation of a company means and involves **all that process** that has got to be gone through before a company's name may be struck off the Register of Companies and before the final dissolution can take place. A company cannot be dissolved abruptly or immediately after it has been ordered to be wound up. Existing transactions have to be completed, assets have to be got in, debts have to be discharged, outstandings have to be realised, suits may have to be brought by the company and suits against the company have to be defended, the capital of the company has got to be returned after the payment of debts in full, and if there be any surplus assets the same have to be distributed among the shareholders. It is only after all these matters have been gone into and all that had to be completed is completed that a final dissolution may take place. **All that precedes the dissolution is called the process of winding up or liquidation.**

### Kinds of Winding Up

There are **three** kinds of winding up :—

- (1) Winding-up **by order of the Court** or **Compulsory** Winding-up ;
- (2) **Voluntary Winding-up**, i.e., a winding-up under a resolution of the company; and
- (3) Winding up **under the supervision of the Court.**

There are two kinds of voluntary winding up :—

- (i) A Creditors' Voluntary Winding up and (ii) a Members' Voluntary Winding-up. Every company is, in its winding up, presumed to be insolvent **unless proved solvent**. No matter however solvent the company really may be, it is deemed to be insolvent, **unless the contrary is proved**. It can be proved solvent by the filing of what is known as a **Declaration of Solvency**, with the Registrar of Companies. The Declaration of Solvency is a declaration made by the directors of a company and filed with the registrar, to the effect that they the directors have looked into the internal affairs and liabilities and assets of the company and are in a position to state, to the best of their knowledge and information, that the company shall be able to pay its debts in full within

a period of three years from the date of the winding up, i.e., the commencement of winding up. When such declaration is filed with the registrar, the company is said to have been proved solvent; otherwise the presumption of insolvency persists and it shall continue to be called insolvent. If it is insolvent the winding up cannot be a members' voluntary winding up; it must be a creditors' voluntary winding up in which the creditors will occupy a predominating part, even in the matter of the appointment of the liquidator. But if the declaration of solvency has been filed and the company has thus been proved solvent, the winding up shall be a members' voluntary winding up in which the members will have a dominating influence and will appoint the liquidator or liquidators.

### Commencement of Winding Up by Order of the Court

A winding up by order of the Court, i.e., a compulsory winding up, is deemed to commence not from the date the order is actually made by the Court but from an earlier date viz., the date at which the petition for winding up is presented before the court, provided of course the petition is granted by the Court.

### Contributories

A contributory is a person who is liable to contribute to the debts, assets and liabilities of the company in the event of its liquidation; also a person who is entitled, as the member of the company, to share in the surplus assets is called a contributory. In this sense, that is in the latter sense, a minor can be a contributory. A minor, however, cannot be a contributory in the sense that he is to contribute to the assets of the company. There are **two types of contributories—the A List type contributories** and the **'B List contributories.'** On the A List of contributories are put the names of all **present members**, i.e., persons who are members of the company at the time of the commencement of the winding up. On the B List are put the names of all **past members**, i.e., members who have ceased to be such **within a year of the winding up**. If the winding up has started one year after the member ceased to be such, the member's name cannot be put even on the B List of contributories.

The liability of the A List contributories is **primary or fundamental** liability, i.e., they are liable in the first instance. The liability of the contributories on the B List is **secondary** liability, i.e., they are liable only if the corresponding A List contributories fail to pay what they are primarily liable to pay. Supposing A transferred his shares to B within a year of the commencement of the winding up, B's name will be put on the A List, and A's name will be put on the B List. Now supposing the Liquidator of the company makes a call on B for the amount remaining to be paid, say Rs. 3,000. If the whole of this sum is paid by B, A is not liable at all. If on the other hand B can pay nothing, A's liability is to the extent of the full amount of Rs. 3,000, payable by B to the Liquidator, if the Liquidator can show that the amounts recoverable from all the contributories will not be enough to discharge all the obligations of the company. Supposing B pays Rs. 1,000 only, A's maximum liability would be for the remaining amount of Rs. 2,000.

### The Nature of Contributory's Liability

The liability of a contributory is a liability **that flows out of the liquidation**. It is a **new** liability and it **arises out of the operation of the law**, and not out of contractual obligation. It is a liability **ex lege**, and not **ex contractu**. So even if a call made by the directors while the company was a going concern had become time-barred, **the liquidator can revive it**, because the very fact of the liquidation creates a new liability on the contributory and vests in the liquidator a new legal right to make a call. Thus a time-barred call may be fully revived by the liquidator. On the other hand, a time-barred debt (other than a call) cannot be so revived. (*Hansraj v. Asthana*, 54, All. 827).

There can be **no set-off of a debt due and owing by the company to a member against the call made by the liquidator** of the company against the member, **unless all the debts have been paid in full** or are capable of being paid in full **or unless the contributory concerned is an insolvent** (in which case the Official Assignee or the Receiver representing the estate of the insolvent can set off the debt due by the company to the insolvent against a call made by the company's liquidator on the Official Assignee or Receiver.)

### Contributories in a Representative Capacity

A contributory in a **representative capacity** means a person who is made a contributory simply because he is representing the estate of the person who was a share-holder of the company or who is an insolvent. Thus after the death of a member, the liquidator cannot make him a contributory. The liquidator must put on the list of contributories the name or names of the executors or administrators (legal representatives) of the deceased shareholders. These representative contributories will then pay **out of the estate of the deceased shareholder** what is due payable on the shares held by him by way of the liability in the liquidation. Likewise if the member concerned is an insolvent all his property, except exempted property which is non-attachable, becomes vested in the Official Assignee or the Receiver, and it is the name of that officer that will be put on the list of contributories. Such contributories are not contributories in personal capacity but only in representative capacity, i.e., they are not liable to pay anything out of their own pocket, but they have to pay only out of the estate of the person represented.

### Grounds under which a Company may be Wound Up by Order of the Court

The following are the grounds for a compulsory winding up :—

- (1) **A special resolution** passed by the company that it be wound up by order of the Court.
- (2) Default made in filing the Statutory Report or in holding the Statutory Meeting (as a rule the Court would be reluctant to make a winding-up order on this ground; an opportunity would be given to the company to make good the default by holding the statutory meeting or filing the statutory report).
- (3) Failure to commence business within a year from the date of incorporation, or suspension of business for a year, provided the failure or the suspension has been caused by a **permanent**, and not a temporary, obstacle in the way of the company. The court must be satisfied that there is no probability of the company being able to carry on with its business or to commence it.
- (4) Fall of the number of members below two, in the case of a private company, or below seven in the case of a public company.
- (5) Inability of the company to pay its debts.
- (6) Any other ground which is **just and equitable** as a ground for winding up the company. The "just and equitable" ground is also called the "**omnibus**" ground or the "**residuary**" ground. It is an all exhausting ground, because the ground need not be ejusdem generis (need not be of the same kind as) to the other grounds specifically mentioned in Section 162 of the Act. Any ground whatever as may appear to the Court to be a fit ground for a winding up may be a just and equitable ground for a winding up.

### Inability of the Company to Pay its Debts

A company is deemed unable to pay its debts, in any of the following cases :—

- (1) A creditor of the company, who has **then due** against the company a claim amounting to **more than five hundred rupees**, has served on the company, by registered post or otherwise, at the registered office of the company, a demand, under his hand, requiring the company to pay the sum so due, and **the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it; or**

- (2) Execution or other legal process issued on a decree or order of a Court in favour of a creditor of the company, has been returned unsatisfied in whole or in part ; or
- (3) Any other case in which the court may consider that the company is unable to pay its debts.

When a company believes, **though erroneously but honestly**, that it is legally justified in refusing to pay on a claim against it, such bonafide refusal by it does not amount to "neglect to pay"(Lallubhai v. Bharat Khand Cotton Mills Co., 1914, 39 Bom. 47).

### Persons who can Present a Winding-Up Petition

A company, any creditor or creditors of the company, any contributory or contributories, or all or any of these parties, or the registrar of companies, can present a petition to the Court for winding up of the company.

A contributory can present a petition for winding up, if the number of members of the company has fallen below two, in the case of a private company, or below seven in the case of a public company. On any other ground a contributory can petition for a winding up, **if** the shares in respect of which he is a contributory were originally allotted to him by the company or the same have been held by him and registered in his name for at least six months (without a break) during the eighteen months immediately prior to the winding up, or if the shares have devolved upon him through the death of a former holder.

A petition for winding up on the ground of default of filing the statutory report or holding the statutory meeting cannot be made by any person other than a shareholder.

The Registrar of Companies can petition for winding up if he is satisfied from the balance sheet of the company or from the report of an inspector that the company has not been able to pay its debts. Such petition by the Registrar can only be presented to the Court after the Central Government has given sanction to the registrar for presenting such petition. The Central Government will not give such sanction without hearing some representative of the company.

The liquidator in a voluntary winding up cannot apply to the Court for a compulsory winding up.

### Effect of a Winding Up Order

The following consequences follow a winding up order :—

- (1) The order operates **in favour of all the interested parties**. Thus if a creditor successfully obtains a winding up order **all other creditors** get the benefit under the same.
- (2) The order operates **as a notice of discharge to the employees** of the company, except where the business of the company is being continued for a beneficial winding up. An employee **for a term of years** who suffers by the **premature** termination of his office can claim compensation for this loss of service, **unless the winding up was the result of misconduct on his part**.
- (3) The **directors** of the company **cease to function**, and the **liquidator or liquidators appear on the scene and take charge of the affairs of the company**, immediately the winding up order is made. The directors become *functus officio* (cease to function in their official capacity) unless they are allowed to act and to the extent to which they are so allowed by the Court or the liquidator in a compulsory winding up, or by the Committee of Inspection or the creditors in a Creditors' Voluntary Winding-up, or by the company in general meeting or the liquidator in a members' voluntary winding-up.

- (4) **No suit or other legal proceeding by or against the company can be brought except with the leave of the Court.** Suits or other legal proceedings already brought by or against the company cannot be continued except with the leave of the Court. The leave of the Court can even be obtained after the suit comes up for hearing. **Administrative proceedings, e.g., an order by the Custodian of Evacuee Property, do not require any leave of the Court.**

### Official Liquidators

Official liquidators are liquidators appointed by the leave of the Court in a compulsory winding up for the carrying out of the process of liquidation of the company.

## LEGAL POSITION OF OFFICIAL LIQUIDATORS

### As Trustees and as Officers of the Court

Official liquidators are trustees, not in the sense of the expression "express trustees," **but as constructive trustees.** In so far as they are in a **fiduciary** position towards their company, and in so far as they are trusted by the Court which appoints them to impartially pay all the debts and discharge the obligations of the company and to return the capital and distribute the surplus assets, they are the trustees of the shareholders of the company taken as a body. They are not trustees of any **individual** shareholders.

They are officers of the Court because they are appointed by the Court. An official liquidator may not be a Court official; he may be a private party, e.g., a chartered accountant or a lawyer, found to be a fit and proper person to discharge the onerous duties of official liquidator. Technically, an official liquidator, though not actually an officer of the Court, is regarded as an officer of the Court for the purpose and during the period of the liquidation. After the liquidation is over and the liquidator has obtained his discharge, he ceases to be an officer of the Court. He is also a **public servant**; and any false information given to him is punishable under the Indian Penal Code, the offence being one of giving false information to a public servant. Interference with the possession of an official liquidator may amount to contempt of Court, because the official liquidator is an officer of the Court.

### Remuneration of Official Liquidator

Official liquidators are allowed such remuneration as the Court may have fixed at the time of appointment.

### Resignation and Removal of Official Liquidator

An official liquidator may resign or may be removed by the Court, **on due cause shown.** He cannot resign at his pleasure, thus abruptly giving up what he has been charged to do. If without any proper cause or reason he resigns his office he will be liable to lose all his remuneration or commission. But for some good and valid reason he can resign. If he is found unfit the Court may remove him.

### Powers of Official Liquidators

**With the leave of the Court,** an official liquidator may do any one or more or all of the following things or exercise any one or more or all of the following powers :—

- (1) Institute or defend any suit or prosecution or other legal proceedings in the name and on behalf of the company. Suits must be brought and defended in the name of the company in liquidation suing or defending through the official liquidator or liquidators.
- (2) Carry on the business of the company for a beneficial winding-up thereof **but not for doing any new business** or entering into any fresh transaction.



- (3) Do all acts, execute all deeds, receipts and other documents, and use, when necessary, the company's seal.
- (4) Sell the moveable and immoveable property of the company.
- (5) Prove, rank and claim in the insolvency of any contributory for any balance against his estate and receive dividends in the insolvency.
- (6) Draw, accept, make and indorse any bill of exchange, hundi or promissory note in the name and on behalf of the company.
- (7) Raise on the security of the assets of the company any money properly required.
- (8) Take out in his official name letters of administration to the estate of any deceased contributory, and do in his official name any other act necessary for obtaining payment of any money due from the contributory or from his estate which cannot conveniently be done in the name of the company itself.
- (9) Do such other things as may be necessary for winding up of the company and distributing its assets.

The liquidator can, with the leave and sanction of the Court, make calls and pay any claims of creditors in full or make any compromise or arrangement with creditors or compromise on calls or liabilities to calls, debts and liabilities capable of resulting in debts, and all calls present or future, certain or contingent, by contributory or alleged contributory or other debtor or person apprehending liability to the company.

The liquidator may summon general meetings of the creditors or contributories for ascertaining their wishes in matters relating to winding up.

The official liquidator may, whenever he thinks fit or necessary, apply to the Court for directions with regard to any matter arising in the winding up.

#### Duties of Official Liquidators

- (1) Liquidators must conduct **equitably and impartially** all proceedings in the winding up according to the provisions of the law.
- (2) They must **take into their custody** all the property, effects and actionable claims of the company, **and must prepare a list of contributories.**
- (3) They must **submit a preliminary report** to the Court stating how they have been carrying on with the winding up.
- (4) They **must keep a record book** and the proper books in the prescribed manner, making entries or minutes of proceedings at meetings and such other matters as may be prescribed by the Court.
- (5) Within a month from the date of the winding up order liquidators **must call a meeting of the creditors for ascertaining whether or not a committee of inspection should be appointed** to act with them and to determine the persons who are to be its members, if such committee has to be appointed. **Within one week of the date of the creditors' meeting, they must call a meeting of the contributories to consider the decision of the creditors.** If the contributories and creditors disagree, the official liquidator must apply to the Court for directions as to whether there shall be a committee of inspection and, if so, what shall be its constitution ;
- (6) Official liquidators **should allow the committee** of inspection, if any, **the right to inspect**, at all reasonable times, **the accounts** kept by them ;
- (7) On a vacancy in the committee the liquidators must **summon a meeting** of creditors or of contributories, as the case may be, **to fill the vacancy ;**
- (8) They must, at such times as may be prescribed by the Court, but at least twice in each year during their office, **present to the Court an account of their receipts and payments as liquidators ;**

- (9) They **must pay all monies received** by them on behalf of the company, **into some scheduled bank**, unless the Court otherwise allows in a non-scheduled bank ;
- (10) They **must pay**, all sums received by them as official liquidators, **in a special banking account** which they must open. They must not pay anything into their own private banking account ;
- (11) If the liquidators have in their hand or under their control **any unclaimed dividends** payable to any creditors **or any undistributed assets** refundable to any contributory, **which have remained unclaimed or undistributed for six months** after the date on which they became payable or refundable, the liquidators **must pay the same into the Reserve Bank of India to the credit of the Central Government in an account called the "Companies Liquidation Account"**. If the liquidators retain any money that should have been paid into the Companies Liquidation Account, they shall have to pay interest on such amount retained at the rate of twenty per cent. per annum and shall also be liable to pay any expenses caused by the default.

### Statement of Affairs to be made to the Liquidator

Upon a winding up order being made, a statement as to the affairs of the company must be made by the directors to the liquidator, with a view to enabling the liquidator to manage the affairs of the company in liquidation and with a view to informing him of the financial affairs and liabilities of the company. The particulars required to be given in the statement are :—

- (1) The debts and liabilities of the company ;
- (2) The assets of the company stating separately the cash balance in hand and in bank, if any ;
- (3) The name, residence and occupation of each creditor stating separately the amount of secured debts and unsecured debts ;
- (4) The debts due to the company, and the name, residence and occupation of each person from whom the same is due and the amount likely to be realised therefrom ;

This statement must be submitted to the liquidator by the directors within 21 days from the relevant date, i.e., the date of the winding up order, or the date of appointment of the provisional liquidator if such liquidator was appointed.

Creditors and contributories can inspect this Statement, the object of which is to enable the liquidator to have some idea of the affairs of the company.

### Appointment of Provisional or Interim Liquidator

Whenever it is shown to the Court **that unless some person is immediately appointed as a provisional liquidator to take charge of the affairs of the company, the directors or other persons in charge of its affairs will in all probability dispose of the assets to the detriment of the applicant**, the Court may order that some fit and proper person be appointed as an interim liquidator (a temporary liquidator). The *raison d'être* of the appointment of a provisional or interim liquidator is that of **protecting the property** from wrongful dissipation or alienation by those in charge of it. The petitioner praying for the appointment of a provisional liquidator must satisfy the Court that (i) unless the provisional liquidator is appointed the assets will be all squandered away to his detriment, and (ii) there is an imminent danger of an alienation of the assets ; and (iii) that the assets are of substantial value so that it is really worth appointing a person to take charge of the same for keeping the same in status quo.

A provisional liquidator is concerned not with the process of liquidation but only with the keeping of the property in status quo. All that is to be done in the carrying on of the liquidation and the completion thereof will be done by the regular liquidator when he gets appointed. In the meantime the interim liquidator acts only to keep the custody of the property, keep accounts relating to its proceeds, and expenses. He has to hand over all the assets thus in his possession and custody to the regular official liquidator as soon as the latter is appointed by the Court.

### Committee of Inspection

A committee of inspection can be appointed in a compulsory winding up. It cannot consist of more than 12 members. Its members are representatives of the creditors and of the contributories of the company; they are either creditors or contributories themselves or persons holding powers-of-attorney from creditors or contributories.

The committee can inspect the accounts kept by the official liquidator. The main object behind the appointment of the committee of inspection is that of getting a body of persons who can **conveniently and efficiently act and voice the views of the creditors and contributories**. The committee of inspection guides and controls the official liquidator in the matters relating to the winding up, and it is the duty of the official liquidator to pay heed to all the just, lawful and sensible wishes of the creditors and contributories conveyed to him through the committee of inspection. The committee can act only if the majority of its members is present.

### Powers of the Court in a Compulsory Winding-up— Ordinary Powers

- (1) Power to settle a list of contributories and to order rectification of register of members.
- (2) Power to require delivery of money, property or documents of the company to the liquidator.
- (3) Power to order payments of debts and allow set-off.
- (4) Power of Court to make calls by a balance order. A Balance Order means an order made by the Court calling upon a contributory to pay to the liquidator the amount payable by him on a call made on him (by the liquidator) which he had not paid. The balance order operates like a decree or order of a Court of law and it can be executed against the property of the contributory concerned. The advantage of taking a Balance Order is that so much time is saved thereby; it is less expensive also. But if the contributory against whom the liquidator seeks to take a balance order, satisfies the judge that he has some defence and that it would not be just to make against him a balance order in a summary way, the Court will ask the liquidator to resort to the remedy of a suit and will refuse to make a balance order in a summary way.
- (5) Power to order payment of money in a scheduled bank for any debt due to the company by a contributory or other person.
- (6) Power to exclude creditors who do not prove their claim in time. The Court can fix the time or times within which the creditors must prove their claims, so that if they do not prove their claims within the time so fixed, they will be excluded from the benefit of any distribution made before these debts are proved. A creditor who is late may nevertheless if there are assets and funds prove his debt provided it is not time-barred at the date of the making of the order of winding up.
- (7) Right to adjust the rights of contributories.

**Extraordinary Powers**

- (1) The Court **can summon before it for examination in Chambers** any person who is believed to be in possession of money, property or other valuable information regarding the affairs of the company. Such person would be put on oath and questioned, and if the Court finds that he is in possession of property or documents or money of the company, the Court will order him to restore the same to the liquidator.  
This examination is called an examination in private, because it is not in open Court, but in chambers of the Judge.
- (2) The Court can order what is known as a **public examination of any promoters, directors, company secretary, manager or other officers of the company, in the winding up** of the Company, if an application for such examination is made to the Court by the liquidator. A prima facie case must be made out by the liquidator in order to procure the public examination. It is the duty of the official liquidator to take part in the public examination. He can have legal assistance as may be sanctioned by the Court. Any creditor or contributory may also take part in the public examination. The Court can examine the person concerned on oath. The object of the public examination is that of finding out the cause or causes of the liquidation and whether any person like a promoter or a director or officer of the company has committed any fraud relating to the affairs of the company or its promotion or formation.
- (3) The Court **can have an absconding contributory arrested and brought before it.**

**The Mode in which the Liquidator pays Debts and returns Capital and Surplus Assets**

Subject to the right of the liquidator to claim even out of the property charged in favour of the secured creditors, any reimbursement for expenses **properly incurred** by the liquidator **for the preservation or realization of the securities of the secured creditors**, the secured creditors come first and foremost and the liquidator cannot interfere with the property charged in their favour. The secured creditors are safe with the property secured in their favour; and the expenses of the winding up properly incurred do not get priority over the claims of the secured creditors. **The official liquidator must reserve some money required for the cost, charges and expenses of the winding up, and then pay what are known as preferential creditors.** Preferential debts are as follows:—

- (1) **Debts due and owing to the State or to a Local Authority**, due from the company at the date of the winding up order and **payable within twelve months next before the winding up**, provided these debts are revenue, taxes, cesses or rates payable to the State or the Local Authority;
- (2) **Wages or salaries of any clerk or servant** for services rendered to the company **within two months next before the winding up, not exceeding Rs. 1,000 in the case of a clerk, and not exceeding Rs. 500 in the case of a workman or labourer**;
- (3) **Compensation payable under the Workmen's Compensation Act**, in respect of death or disablement of any employee of the company;
- (4) All sums due to any employees of the company from a **Provident Fund, Pension Fund or Gratuity Fund or any other fund** for the welfare of the employees of the company;
- (5) **The expenses of any investigation into the affairs of the company** on report made to the Government by the registrar of companies.

If the assets of the company are not sufficient to discharge the preferential debts in full, the preferential creditors have to take proportionately, ranking *pari passu*. In so far as the assets are not sufficient to meet the claims of the preferential creditors, the preferential creditors, have a priority over the debenture-holders with a floating charge. After that the unsecured or ordinary creditors are paid according to their claims, and if they could not be paid in full, they rank *pari passu*.

After the debts are all paid up, if there are any assets remaining, the same are to be distributed among the shareholders in accordance with their right to **the return of the capital**, so that the holders of preference shares with a preferential right both as regards dividends and capital shall have a priority over the ordinary shareholders. But where the preference shares are preferential as regards dividends but not as regards capital, the preferential shareholders shall not get any priority over the ordinary shareholders.

If there be any **surplus assets** left after the return or redistribution of the capital among the shareholders, all shareholders are entitled to take **equally** in these surplus assets, that is, **subject to the Articles of Association**, no shareholders shall have priority but all shall take *pari passu*. Whatever else the articles provide may be valid.

### Dissolution of the Company

After the affairs of the company get compulsorily wound up, an order is taken from the Court that the company be **dissolved as from the date of the Court's order**. If the official liquidator passes his official account he is to apply to the Court for such order for dissolution of the company. Within fifteen days from the making of the order, the official liquidator must report the order to the registrar of companies of the State concerned, and then it is the duty of the registrar to make in his book **a minute of dissolution of the company**.

The dissolution of a company may be declared void **at any time within two years of the date of the dissolution**, on an application made by the liquidator or by any interested person to the Court **for such resuscitation** of the company. In *re Scad*, 1941, 2, All. E.R. 466, it was held that the period of two years means the period between the date of the dissolution and the date of filing the application for cancellation of the dissolution; that means that **if the petition for the cancellation of the dissolution is filed in Court within two years from the date of the dissolution**, the requirement of the Act is fulfilled, **and it does not matter when the Court actually makes the order nullifying or cancelling the dissolution**. The petition may come up for hearing even after two years have expired from the date of the dissolution, e.g. it may be even after the expiration of three years; the order made by the Court cancelling the dissolution will be regarded as perfectly valid.

The liquidator must not unduly destroy the papers and documents of the company even after the dissolution is complete, because as already mentioned the company may be resuscitated by an order of the Court cancelling the dissolution. The liquidator must wait **for atleast three years after the date of the dissolution of the company**, i.e., the date of the order of the Court dissolving the company.

## VOLUNTARY WINDING UP

### Grounds for Voluntary Winding Up

The company may be wound up voluntarily on any one or more of the following grounds:—

- (1) That the period fixed by the Articles for the existence of the company is over or that the purpose for which the company had been formed is accomplished, or that some event mentioned by the articles as the event in which the winding up should take place, has taken place; on any such ground **any resolution** passed by the shareholders of the company **is a sufficient resolution**;

- (2) That the company cannot because of its liabilities continue its business and that looking to the circumstances it is desirable to have it wound up ; **an extraordinary resolution is necessary** in such case ;
- (3) **That a special resolution has been passed** by the shareholders of the company deciding to have a voluntary winding up of the company. The ground may be **any ground whatever accepted by the company** as a ground for voluntary winding up ; such ground of course is other than any of the grounds mentioned in (1) and (2) above.

A resolution by the shareholders of the company for a voluntary winding up of the company is called a **Resolution for Voluntary Winding Up**.

### **Points of Distinction between a Members' Voluntary Winding Up and a Creditors' Winding Up**

- (1) Where a company has proved its solvency by filing with the registrar of companies a **Declaration of Solvency** wherein its directors have stated that to the best of their knowledge and information the company will be able to pay **all its debts in full within a period of three years from the commencement of the winding up**, the winding up shall be a members' voluntary winding up. On the other hand where the company has not proved its solvency by filing a Declaration of Solvency, **the presumption of its insolvency persists**, and the winding up shall be a creditors' voluntary winding up.
- (2) In a members' voluntary winding up the members occupy a dominating part ; but in a creditors' voluntary winding up the creditors have an overwhelming influence.
- (3) In a members' voluntary winding up the liquidator is appointed and remunerated by the members. In a creditors' voluntary winding up the liquidator is appointed by the members and the creditors at their respective meetings ; and if they disagree, the person or persons appointed by the creditors shall be regarded as duly appointed unless the members appeal to the Court for setting aside the creditors' choice and for having the appointment made by them confirmed by the Court or for having any other person or persons as the Court may think fit to appoint as the liquidator or liquidators.
- (4) In a members' voluntary winding up **there is no Committee of Inspection** ; but in a creditors' voluntary winding up there **may be a Committee of Inspection**.
- (5) In a members' voluntary winding up, the liquidator accounts and reports to the members ; but in a creditors' voluntary winding up, the liquidator accounts to the creditors and members.

### **Commencement of Voluntary Winding Up**

A voluntary winding up is deemed to commence from the time of the passage of the resolution for voluntary winding up.

### **Consequences of Voluntary Winding Up**

Unlike a compulsory winding up, a voluntary winding up does not bring about a stay of suits and legal proceedings unless the liquidator applies for such stay ; so also, unlike a winding up by an order of the Court, in the case of a voluntary winding up, suits by or against the company can be brought without the leave of the Court, though it is open to the liquidator to apply for a stay of such suit or other legal proceeding.

Another important consequence of a voluntary winding up is that the directors cease to function except to the extent to which they are allowed to function.

The company must cease to carry on its business except for a beneficial winding up, and the servants of the company are deemed to be discharged if the company has ceased to do business.

Debentures with a floating charge get crystallized, and debentures payable at a future date become payable immediately.

### **The Legal Position of Voluntary or Non-Official Liquidators**

A voluntary liquidator is a non-official liquidator, and is not regarded as a public servant. He is a trustee for the company and its creditors ; but not for individual creditors or shareholders. He is a trustee only in the sense that he is in a fiduciary position towards his company and its creditors. He is an agent of the company whose liquidator he is appointed.

## **POWERS AND DUTIES OF LIQUIDATORS**

### **Powers**

- (1) In a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, and in a creditors' voluntary winding up, with the sanction of the Court or of the Committee of Inspection, a voluntary liquidator can exercise any of the following powers :—
  - (a) Do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's seal ;
  - (b) Prove, rank and claim in the insolvency of any contributory for any balance against his estate, and receive dividends in respect of that balance as a separate debt due from the insolvent and rateably with the other creditors ;
  - (c) Draw, accept, make, indorse bills of exchange, promissory notes, hundis, in the name and on behalf of the company ;
  - (d) Take out in his official name letters of administration to any deceased contributory.
- (2) Without the sanction of the Court or of the Committee of Inspection or of the company, the liquidator can exercise any of the powers (other than those mentioned under (a), (b), (c) & (d) in the preceding paragraph) given to the official liquidator under the Indian Companies Act.
- (3) Can exercise the power to settle lists of contributories.
- (4) Can make calls.
- (5) Can summon general meetings of the company for obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit.
- (6) He can, with the sanction of an extraordinary resolution of the company, pay any claims of creditors in full, enter into compromise or arrangement with creditors, and compromise any calls or liabilities to calls, debts and liabilities capable of resulting in debts and all claims between the company and a contributory or alleged contributory or other debtor or person, and all questions relating to the assets or to the winding up.

### **Duties**

- (1) He must administer the assets so that the same may be properly used in discharging all obligations of the company and in distribution of surplus assets among the members of the company.

- (2) He must within 21 days after his appointment as liquidator deliver to the registrar of companies a notice of his appointment in the form prescribed by the Court.
- (3) If the winding up lasts for more than a year, the liquidator must, in a members' voluntary winding up, summon a general meeting of the company, and in a creditors' voluntary winding up, summon a meeting of the members and also a meeting of the creditors at the end of the first year from the commencement of the winding up and of each succeeding year or as soon thereafter as convenient within 90 days of the close of the year, and must lay before the meeting or meetings an account of his acts and dealings in the winding up during the preceding year and a statement regarding the position of the liquidation.
- (4) As soon as the affairs of the company are fully wound up, the liquidator must make up an account of the winding up affairs and must call a general meeting of the company so that the account may be laid before the meeting. Within one week after the meeting the liquidator must send to the registrar a copy of the account; and must make a return to him of the holding of the meeting and of its date. This applies to a members' voluntary winding up also.

### **Committee of Inspection**

A Committee of Inspection can be appointed in a creditors' voluntary winding up; but the Companies Act makes no provision whatever for a Committee of Inspection in the case of a members' voluntary winding up, the reason being that the members alone have a dominating influence, control and interest in a members' voluntary winding up and the company is solvent.

The Committee of Inspection in a creditors' voluntary winding up, may be appointed to guide the voluntary liquidator or liquidators with regard to the affairs of the company in its liquidation and to convey to him or them the wishes of the creditors and contributories. It may involve time and money calling every now and then a meeting of the entire body of contributories; hence the law has provided for an easier and speedier way of communicating to the liquidator the wishes of the creditors and contributories through the Committee of Inspection, which is a smaller and a handier body. The liquidator is not bound by the wishes of the Committee of Inspection if such wishes are contrary to the Act or law or unreasonable.

The creditors can appoint not more than five persons; and the members can appoint not more than five persons as their representatives. Where the creditors and members do not agree with regard to the appointment of the members of the Committee of Inspection and if the creditors decide that all or any of the persons appointed by the contributories to act as members of the Committee of Inspection, should not be members of the committee, such persons shall not, unless the Court otherwise allows them to act, be members of the Committee. The Court may appoint other persons to act as such members instead of the persons objected to by the creditors.

### **Way in which the Voluntary Liquidator has to pay the Debts, return the Capital and distribute Surplus Assets**

The law on this point is the same as in the case of a compulsory winding up.

(Please see the notes on that point—already dealt with, in the case of compulsory winding up.)

### **Dissolution of the Company**

(Same as in the case of a compulsory winding up already dealt with in an earlier chapter.)

### **Winding Up under Supervision of the Court**

A voluntary winding up may be superseded by a winding up by an order of the Court or may simply be brought under the control and supervision of the Court. If it is a winding



up under the supervision of the court it is really the continuance of the voluntary winding up under the superintendence, direction and control of the Court.

A winding up under supervision is deemed to commence as from the date of the passage of the resolution for voluntary winding up.

The object of a supervision order is that of ensuring protection for all the interests likely to be affected or involved by or in the winding up.

The court may, when it makes the supervision order or at any time later, appoint any **additional liquidator** to act with the voluntary liquidator. If the Court does not appoint any additional liquidator, the existing liquidator will continue to act by himself.

If an additional liquidator is appointed by the Court, his powers, duties and legal position shall be the same as that of a voluntary liquidator appointed by the company. The Court can remove any liquidator and fill the vacancy. The Court can remove, on some valid reason, any additional liquidator appointed by it, or any liquidator appointed under the supervision order. The court can also fill any vacancy caused by the removal of the liquidator by it, or by death or by resignation.

The effect of a supervision order is that the liquidator may, **subject to such restrictions as the Court may impose**, exercise all his powers without the sanction or intervention of the Court, in the same manner as if the winding up were absolutely a voluntary winding up. The effect of the supervision order is not to take away the powers of the existing voluntary liquidator or to alter the course of the voluntary winding up which is allowed to continue as before subject only to the superintendence and control by the Court. The supervision order gives the creditors, the contributories and others the power to apply to the Court for such orders as may be felt necessary or expedient for an impartial winding up. Any attachment, execution, distress or sequestration against the property or effects of the company in winding up by or under the order or supervision of the Court is avoided unless the Court has allowed the continuance of the same.

### **Distinction between the Winding-Up of a Company and the Insolvency of an Individual**

- (1) A company may be wound up **even though fully solvent**, e.g., for an amalgamation or a reconstruction or because the purpose for which it had been formed is fulfilled ; **but a solvent individual cannot be declared insolvent except by an erroneous order** of the Court.
- (2) In a winding up of a company, **the insolvency rules relating to 'reputed ownership' do not apply**. The doctrine of reputed ownership, which applies to the case of traders and goods, says that goods which are at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner, in such circumstances that the insolvent becomes the reputed owner thereof, are divisible among the insolvent's creditors. This doctrine is unknown to Company Law.
- (3) An individual may be declared an insolvent, **but a registered company cannot be declared insolvent**, but can only be wound up or removed as a defunct company.
- (4) The insolvency of an individual involves that the property of the insolvent wheresoever situated, excepting certain exempted property, **vests in the official assignee or the receiver**, as the case may be, **but in the winding up of a company the property of the company is not vested in the liquidator but remains vested in the company itself**.

### **Transfer of Shares and Alteration in the Status of Members after the Commencement of the Winding-Up**

In the case of a compulsory winding up shares cannot be transferred except with the leave of the Court. Such leave will only be granted in exceptional cases to protect an innocent transferee.

In a voluntary winding up shares cannot be transferred, except to, or with the sanction of, the liquidator.

In a winding up under supervision of the court, shares cannot be transferred except with the leave of the Court.

Any alteration in the status of the members of the company after the commencement of the winding up is void.

### **Disclaimer of Onerous Property**

The liquidator of a company may, with the leave of the Court, disclaim any onerous (burdensome) property, e.g., shares and stock in a company on which calls may be made rather than any dividends paid. The liquidator can disclaim within twelve months after the commencement of the winding-up or such extended time as may be allowed by the Court.

### **Disposal of Documents of the Company**

After the company has been wound up and is about to be dissolved, its documents and the documents of its liquidator may be disposed off in such manner as the Court may think fit in the case of a winding up by or under the supervision of the Court, or in such manner as the company by an extra-ordinary resolution may order in the case of a voluntary winding up. After three years from the dissolution of the company, the company shall not be held responsible for not handing over the documents to any person interested therein, because after the company's dissolution the company is no more in existence.

### **Power of the Court to Assess Damages against Delinquent Directors, Promoters, Manager, Liquidators, or any Officer of the Company**

The Court may, on an application made to it by the liquidator or by any creditor or contributory, within three years from the date of the first appointment of a liquidator or of misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer, examine into the conduct of the promoter, director, manager, liquidator or officer who is suspected of having misapplied or retained or of having become liable or accountable for any money of the company, or of having been guilty of misfeasance or of breach of trust in relation to the affairs of the company. If after examining into the conduct of the suspected person, if it thinks fit, the Court may compel him to repay or restore the property or money or any part thereof, with interest thereon at such rate as it may think fit to allow; or the Court may order the contribution of such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court may deem fit to order.

### **Winding Up of Unregistered Companies**

An unregistered company **includes** a partnership, an association or a company having more than seven members but does not include a railway company incorporated by an Act of Parliament or some Indian Law or a company registered under the Indian Companies Act. In *Strauss & Co.'s Case* 38 Bom. L.R. 1080, it was held that section 270 of the Companies Act is **enumerative but not exhaustive**, and that a foreign company, **whether consisting of more than seven members or not**, can be wound up as an unregistered company if it does business in India, even though an order for winding up has already been made by the Court at the place where the company was incorporated. But according to the Rangoon High Court (*Chettyar v. Hormusji*, 8 Rang. 658), a company can be wound up as an unregistered company only if it has more than seven members, and not otherwise.

An unregistered company can be wound up under the provisions of the Indian Companies Act ; and all the winding up provisions of the Act are applicable to such a company, subject to the following qualifications and modifications :—

- (1) The Court of the place where the company is doing business or of the principal place where the company is carrying on its business, can make an order for winding up. The registered office is deemed to be situated in the place which is the principal place of business of the company. If the company has more than one principal place of business, the registered office is deemed to be situated in each of these principal places of business.
- (2) An unregistered company may be wound up by an order of the Court, but not voluntarily or subject to the supervision of the Court.
- (3) An unregistered company may be wound up under the Act if it has been dissolved or has ceased to do business or is doing business simply for winding up ; or if it is unable to pay its debts or the Court considers it just and equitable to wind it up.
- (4) An unregistered company is considered to be unable to pay its debts if a creditor of the company having a claim against the company of a sum exceeding five hundred Rupees has served on the company a demand requesting it to pay the sum due, and the company has neglected to pay the sum or to secure or compound for it to the satisfaction of the Court, or if any suit or legal proceeding is instituted against a member for a debt, due or alleged to be due, from him, and a notice of the institution of the legal proceedings or suit is given to the company, and the company has not, within 10 days after the service of the notice, paid, secured or compounded for the debt or demand, or procured a stay of the proceedings or indemnified the defendant ; or if execution or other process against the company or a decree or order obtained by any creditor has not been satisfied ; or if it is otherwise proved to the satisfaction of the Court that the company cannot pay its debts.

### **Amalgamation and Reconstruction**

Amalgamation means the **blending** of two or more concerns or companies into one. Reconstruction involves the blending of two or more companies into one **or the continuance of one concern in a reconstituted manner**. Reconstruction implies that the existing business is carried on in some altered form, so that the persons interested and the business **substantially may be the same**.

The **method** by which reconstruction or amalgamation can take place is either that of a winding-up or that of resorting to a scheme of transfer of undertaking of one company (the transferor company) to another company (the transferee company). When the scheme is resorted to, sanction of the Court is required.

### **Power of the Central Government to make Rules**

The Central Government may make rules providing for all or any matters which under the Act are to be prescribed by its authority. Every such rule is published in the Official Gazette, and, on such publication, is deemed to be as effective as under the Companies Act.

### **Provisions for the Benefit of Employees**

Any sum of money taken by a Company from any of its employees **as security** for good behaviour and honest service or otherwise, must be kept deposited by the Company in a **separate** account in a **Scheduled Bank**, and must not be mixed up with the Company's moneys. No portion of the deposit amount can be utilised by the Company, except for the purpose (if any) agreed to in the contract of service.

Any **provident fund** constituted by the Company for the benefit of any class of its employees, and any and all moneys contributed to such fund, and all moneys accrued as interest on such funds or otherwise accrued to such fund, must be invested and kept invested in **trust** securities. The Company cannot use any portion whatever of the funds for its own use.

An employee of the Company has the right to request the Company to show him the Scheduled bank's receipt for any money or security deposited with it by the Company, and the Company is bound to show such receipt to the employee.

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## CHAPTER XXXIII.

### LAW RELATING TO BANKING COMPANIES

#### Definition of 'Banking Company'

'Banking Company' means any Company which does the business of accepting, for the purpose of lending or investment, of deposits of money from the members of the public repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise'

A banking Company does not cease to be a banking company merely because there is an order of the Central Government under Sec. 5 of the Banking Companies (Inspection) Ordinance, 1946, prohibiting it from receiving fresh deposits. (*Jwala Bank Ltd. v. Shitla Singh* 1950, 20 Comp. Cas. 238). Any company which manufactures goods or carries on any trade and which accepts deposits of money merely for financing its business as such manufacturer or trader is not a banking Company.

#### Kinds of Business a Banking Company may engage in

A Banking Company must limit its objects to the carrying on of the business of accepting deposits of money on current account or otherwise, subject to withdrawal by cheque or draft or otherwise, along with some or all of the forms of business laid down in Section 6 of the Banking Companies act.

Under Section 6 of the Banking Companies Act a Banking Company may, in addition to the business of banking, engage in any one or more of the following forms of business :—

- (a) The borrowing, raising or taking up of money ; the lending or advancing of money either upon or without security ; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and other securities whether transferable or negotiable or not ; the granting and issuing of letters of credit, travellers' cheques and circular notes ; the buying, selling and dealing in bullion and specie ; the buying and selling of foreign exchange including foreign bank notes, the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture-stock, bonds, obligations, securities and investments of all kinds ; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances ; the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise ; the providing of safe custody vaults ; the collecting and transmitting of money and securities ;
- (b) Acting as agents for any Government or any Local Authority or any other person or persons ; the carrying on of agency business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as attorney on behalf of customers, but excluding the business of a managing agent of a company ;
- (c) Contracting for public and private loans and negotiating and issuing the same ;
- (d) The effecting, ensuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue ;
- (e) Carrying on and transacting every kind of guarantee and indemnity business ;
- (f) Managing, selling and realising any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims ;

- (g) Acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such property ;
- (h) Undertaking and executing trusts ;
- (i) Undertaking the administration of estates as executor, trustee or otherwise ;
- (j) Establishing or supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveyances calculated to benefit employees or ex-employees of the company or the dependants or connections of such persons ; granting pensions and allowances and making payment towards insurance ; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object ;
- (k) The acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the Company ;
- (l) Selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing off or turning into account or otherwise dealing with all or any part of the property and rights of the company ;
- (m) Acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a type enumerated or described in this sub-section, viz., Sub-Section (1) of Section 6 of the Banking Companies Act, 1949 ;
- (n) Doing all such other things as are incidental or conducive to the promotion or advancement of the business of the Company ;
- (o) Any other form of business which the Central Government may, by notification in the official Gazette, specify as a form of business in which it is lawful for a banking company to engage.

[No banking company can engage in any form of business other than the abovementioned.]

### **Prohibition of Trading**

No Banking Company can directly or indirectly deal in the business of buying or selling or bartering of goods, except in connection with the realisation of security given to or held by the Company ; and no Banking Company shall engage in any trade, or buy, sell or barter goods for others otherwise than in connection with bills of exchange received for collection or negotiation or with the undertaking of the administration of estates as executor, trustee or otherwise.

### **Disposal of Non-banking Assets**

A banking company cannot hold any immovable property, howsoever acquired, except for its own use, for any period exceeding 7 years from the acquisition of it, or from the commencement of the Banking Companies Act, 1949, whichever is later or on any extension of time as may be allowed, and such property shall be disposed of within such period or extended period of time, as the case may be. A banking company may, within the period of 7 years as mentioned, deal or trade in any such property for facilitating its disposal. The Reserve Bank may, in any particular case, extend the period of 7 years by such further period not exceeding 5 years, if the Reserve Bank is satisfied that such extension of time is required in the interests of the depositors of the banking company.

### **Managing Agents Prohibited**

Managing Agents can no longer exist in the case of Banking Companies.

### Restrictions on Employment of Certain Types

Under Section 10 of the Banking Companies Act, no banking company shall employ any person—

- (1) who is, or at any time has been, adjudicated insolvent or has suspended payment of his debts, or has compounded with his creditors, or who is or has been convicted of an offence involving moral turpitude ; or
- (2) whose remuneration is wholly or partly based on commission or profit sharing ; or
- (3) whose remuneration is, looking to the normal standards in banking business, on a scale disproportionate to the resources of the Company ; or
- (4) who is appointed in managing capacity and is yet a director of any other Company, not being a subsidiary of the Banking Company, or who is engaged in any other business or vocation or has a contract of over 5 years, at any one time, with the Company to manage its affairs.

Any contract with the Company for its management may be renewed or extended for a further period not exceeding 5 years at a time if and so often as the directors so think fit and decide.

Whenever any question arises in any particular case whether the remuneration is on a scale disproportionate to the resources of the Company, the decision of the Reserve Bank on that point shall be final for all purposes.

### Requirement as to Minimum Paid-up Capital and Reserves

Existing banking companies cannot, after the expiry of three years from the commencement of the Banking Companies Act, 1949, or such further period not exceeding one year as the Reserve Bank (having regard to the interest of the depositors of the Company) may think fit to allow, carry on business in India unless they have a paid-up capital and reserves of such aggregate value as is required under Section 11 of the Banking Companies Act. Other banking companies shall, after the commencement of this Act, see that before they commence or carry on business in India, they have paid-up capital and reserves as required by Section 11.

If a Banking Company is incorporated outside India, the aggregate value of its paid-up capital and reserves shall not be less than 15 lakhs of rupees ; if it has a place or places of business in Calcutta or in the City of Bombay or both, the aggregate value of its paid-up capital and reserves must be at least 20 lakhs of rupees.

No Banking Company incorporated outside India shall be deemed to have complied with the provisions of Section 11 unless it deposits and keeps deposited with the Reserve Bank an amount not less than the minimum required (as already mentioned) either in cash or in unencumbered approved securities or partly in cash and partly in such securities.

The 'Approved Securities' are securities in which a trustee can invest money under Clause (a), Clause (b), Clause (bb), Clause (c) or Clause (d) of Section 20 of the Indian Trusts Act, 1882, and such securities of, or fully guaranteed by, acceding States, as the Reserve Bank may be authorised to purchase under Clause (B) of Section (17) of the Reserve Bank of India Act, 1934.

In the case of a Banking Company which is not incorporated outside India, the aggregate value of its paid-up capital and reserves shall not be less than 5 lakhs of rupees if it has places of business in more than one State, and not less than 10 lakhs of rupees if any such place or places of business is or are situated in the City of Bombay or Calcutta or both. If such a Banking Company has all its places of business in one State none of which is situated in the City of Bombay or Calcutta, the aggregate value of its paid-up capital and reserves must be not less than one lakh of rupees in respect of its principal place of business, plus ten thousand rupees in respect of each of its other places of business situated in the same district in which it has its principal place of business, plus twenty-five thousand rupees in respect of each place of business situated elsewhere in the State otherwise than in the same district ; provided, however, that such Banking Company shall not be required to have paid-up capital and reserves exceeding an aggregate value of five lakhs of rupees, and if such Company has only one place of business it shall not be required to have paid-up capital and reserves exceeding an aggregate value of fifty thousand rupees. If it has all its places of business in one State, one or more of such places being situated in the City of Bombay or Calcutta, the aggregate value of its paid-up capital and reserves shall be at least five lakhs of rupees, plus twenty-five thousand rupees in respect of each place of business situated outside the City of Bombay or Calcutta. It is however provided that such Banking Company shall not be required to have paid-up capital and reserves exceeding an aggregate value of ten lakhs of rupees.

Any amount deposited and kept deposited with the Reserve Bank, in cash or in unencumbered approved securities or in both, as required by the Proviso to Sub-Section 2 of Section 11 of the Act, by a banking company incorporated outside India, shall, if the Company ceases to carry on banking business in India, be regarded as an asset of the Company on which the claims of all the creditors of the Company in India shall be a first charge.

If there be any dispute in computing the aggregate value of the paid-up capital and reserves of any Banking Company, the Reserve Bank's decision in that matter shall be final for the purpose of Section 11.

### **Regulation of Paid-up Capital, Subscribed Capital and Authorised Capital**

The subscribed capital of a banking company carrying on business in India, must not be less than one half of its authorised capital; and the paid-up capital must be at least one half of the subscribed capital. If its capital is increased it must comply with the conditions prescribed, within such period not exceeding two years as the Reserve Bank may allow.

All the shares of a Banking Company shall be Ordinary Shares only (excepting the already existing shares of different kinds).

The voting rights of any shareholder shall not exceed five per cent. of the total voting rights of all the shareholders. The voting rights of all the shareholders shall be strictly proportionate to the contribution made by them to the paid-up capital of their company.

### **Restriction on Commission, Brokerage, Discount on sale of Shares**

A banking company shall not pay out directly or indirectly any commission, brokerage, discount or remuneration in any form in respect of any shares issued by it, exceeding in the aggregate two and half per cent. of the paid-up value of those shares.

### **No Charge on unpaid Capital**

No charge can be created upon its unpaid capital by a banking company. If any such charge is created it shall be invalid.

### **Restrictions regarding Payment of Dividend**

No dividend shall be paid by a banking company on its shares until all its capitalised expenses have been completely written off. Capitalised expenses include preliminary expenses, organisation expenses, share-selling commission, brokerage, amounts of losses incurred and any other item of expenditure not represented by tangible assets.

### **Prohibition of Common Directors**

No banking company incorporated in India can have as a director any person who is a director of another banking company. A director however of a banking Company may validly be a director of any other company which is not a banking company. But a managing director of a banking Company cannot be director of any other company (even non-banking), not being a subsidiary company of the banking company.

### **Reserve Fund**

Every banking company incorporated in India must maintain a reserve fund, and must, out of the net profits of each year and before declaring of any dividend, transfer a sum equal to not less than twenty per cent. of such profits to the reserve fund until its amount becomes equal to the company's paid-up capital.

[The expression "net profits" has the same meaning here as under Sec. 87C (3) of the Indian Companies Act, 1913.]

The Reserve Fund cannot be improperly utilised. (*Public Prosecutor v. Anantha*, 1943, Mad. 629). An ordinary director cannot be convicted, if he was not knowingly and wilfully guilty of the default. (*In re Neelakantan* 1940, 1 Mad. L. J. 478).

### **Cash Reserve**

Every banking company (other than a Scheduled Bank) must maintain by way of cash reserve in cash with itself, or in an account opened with the Reserve Bank, or partly in cash with itself and partly in such account at the Reserve Bank, a sum equal to at least two per cent. of its time liabilities and five per cent. of its demand liabilities. It must file with the Reserve Bank before the 15th day of every month three copies of a Statement of the amount so held on Friday of each week of the preceding month with particulars of its time and demand liabilities on each Friday.



### Restriction on Subsidiary Companies

No banking company can form any subsidiary company unless such subsidiary company is formed for one or more of the following purposes :—

- (1) The undertaking and executing of trusts ;
- (2) The undertaking of the administration of estates as executor, trustee or otherwise ;
- (3) The providing of safe deposit vaults ; and
- (4) Such other purposes as are incidental to the business of banking provided the previous sanction in writing of the Reserve Bank has been taken in that behalf.

Except as provided in the preceding paragraph, a banking company shall not hold shares in any company, whether as pledgee, mortgagee or absolute owner of any amount exceeding thirty per cent. of the paid-up share capital of that Company or thirty per cent. of its own paid-up share capital and reserves, whichever is less.

Any banking company which is holding shares otherwise than as provided above must report the matter without delay to the Reserve Bank and must bring the holding of shares into conformity with the provisions mentioned above, within such period not exceeding two years as the Reserve Bank may allow.

Except as otherwise abovesaid, a banking company must not, after the expiry of one year from the date of the commencement of the Banking Companies Act, 1949, hold shares whether as pledgee, mortgagee or absolute owner, in any Company in the management of which any managing director or manager of the banking company is in any manner concerned or interested.

### Restrictions on Loans and Advances

No loans or advances may be made by a banking company on the security of its own shares. **Unsecured** loans or advances to any of its directors or firms or private companies in which it or any of its directors is interested as partner or managing agent or to any individuals, firms or private companies in cases where any of the directors is a guarantor, cannot be made by banking companies.

[A loan or advance is said to be **unsecured** when it is made on a security of assets the market value of which is less than the amount of such loan or advance. That means that to constitute a **secured loan or advance**, the market value **at all times** of the assets given as security for the loan must be equivalent to the amount of the loan or advance if not more than that.]

Every Banking Company must, in this respect, before the close of the month succeeding that to which the Return relates, submit to the Reserve Bank a Return in the prescribed form and manner, showing all unsecured loans and advances granted by it to companies in which it or any of its directors is interested as director or managing agent or guarantor. If after examining any such Return, the Reserve Bank is of the opinion that any loans or advances, referred to in this paragraph are being granted to the detriment of the interests of the depositors of the banking company, the Reserve Bank may, by order in writing, prohibit the banking company from granting any such further loans or advances or may impose such restrictions on the grant of such further loans or advances, as it may think fit, and may also direct the banking company concerned to secure the re-payment of any such loan or advance within such time as may be specified by the order.

### Reserve Bank's Power to control Advances by Banking Companies

Where the Reserve Bank is satisfied that it is necessary or expedient in public interests to do so, the Reserve Bank may determine the policy in relation to advances to be followed by banking companies generally or by any banking company in particular. When the policy

has been so determined, the banking companies or the banking company concerned must follow that policy. The Reserve Bank may give directions to banking companies generally or to any particular banking company or group of banking companies, regarding the purposes for which advances may or may not be made, the margins to be maintained in respect of secured advances and the rates of interest to be charged on advances. Such directions shall be binding on the banking companies or company concerned, as the case may be.

### **Licensing of Banking Companies**

No banking company can do business in India unless it has been allowed a licence by the Reserve Bank in that behalf.

An application in writing has got to be made to the Reserve Bank for a licence under Section 22. Before granting the licence, the Reserve Bank may require to be satisfied by an inspection of the books of the banking Company or otherwise that all or any of the following conditions are satisfied :—

- (a) that the Company can pay its depositors in full as and when their claims fall due ;
- (b) that the affairs of the company are not being conducted to the detriment of the depositors ; and
- (c) if the company is registered outside India, that the Government or the law of the country where the Company is incorporated does not discriminate in any way against banking companies incorporated in India, and that the company satisfies all the provisions of the banking Companies Act, 1949, applicable to banking companies incorporated outside India.

The Reserve Bank may cancel any licence if any of the abovesaid conditions ceases to be satisfied or if the company ceases to carry on banking business in India or goes into liquidation.

The Reserve Bank may, at any time after granting a licence, require that any of the conditions, the fulfilment of which were not required at the time of granting the licence, shall be fulfilled to the satisfaction of the Reserve Bank, within such time as it may specify. If such conditions are not then fulfilled, the Reserve Bank may cancel the licence.

Any banking company aggrieved by the cancellation of its licence, may appeal to the Central Government against such cancellation. The decision of the Central Government on such Appeal shall be final.

### **Restrictions on opening of New Places of Business, and Transfer of Existing Place of Business**

A banking company cannot, without first obtaining the permission in writing of the Reserve Bank, open a new place of business in any part of India, or change (otherwise than within the same city, town or village), the location of an existing place of business situated in any part of India. This applies also to Banking Companies incorporated in India wishing to open a new place of business outside India or wishing to change (otherwise than within the same city, town or village), in any other country or area outside India the location of its existing place of business. Before giving such permission the Reserve Bank may require to be satisfied by an inspection under Sec. 35, or otherwise about the financial condition and history of the company, the general character of its management, the adequacy of its capital structure and earning prospects and that public interests will be served by the opening or change of location of the place of business.

The abovementioned provisions do not apply when a banking company opens for a period not exceeding one month a temporary place of business within a city, town or village within which the banking company already has a place of business for affording banking facilities to the public on the occasion of an exhibition or conference or mela.

A "place of business" includes any sub-office, pay office, sub-pay-office and any place of business at which deposits are received, cheques cashed or moneys lent.

### **Maintenance of a Percentage of Assets**

Every banking company must maintain in cash, gold or unencumbered approved securities, valued at a price not higher than the current market price, an amount which shall not at the close of business on any day be less than twenty per cent. of the total of its time and demand liabilities in India.

Liabilities do not include the paid-up capital or the reserves or any credit balance in the profit and loss account of the company or the amount of any loan taken from the Reserve Bank. In computing the amount abovesaid the deposit made with the Reserve Bank by a banking company incorporated outside India and any balance maintained by a banking company with the Reserve Bank or its agent or both shall be deemed to be cash maintained.

Every banking company must, not later than fifteen days after the end of the month to which it relates, furnish to the Reserve Bank in the prescribed form and manner a monthly return showing particulars of its assets, and its time and demand liabilities at the close of business on each Friday during the month or if any Friday be a public holiday then at the close of business on the preceding working day.

### **Assets in India**

The assets in India of every banking company at the close of the last working day of every quarter shall not be less than seventy-five per cent. of its demand and time liabilities in India.

Every banking company must, within one month from the end of every quarter, submit to the Reserve Bank a Return in the prescribed form and manner of the assets and liabilities as at the close of the last working day of the previous quarter.

"Assets in India" are deemed to include export bills drawn in, and import bills drawn on and payable in India, and expressed in such currencies as the Reserve Bank may from time to time approve and also such Securities as might be approved by the Reserve Bank, notwithstanding that all or any of the said bills or securities are held outside India.

### **Return of unclaimed Deposits**

Every banking company is required, under Section 26, to submit, within thirty days from the close of each calendar year, a return, in the prescribed form, to the Reserve Bank, as at the end of such calendar year, of all accounts in India which have not been operated upon for ten years, giving particulars of the deposits standing to the credit of each such account, provided that where money is deposited for a fixed period the said term of ten years shall be reckoned from the date of the expiry of such fixed period.

### **Monthly Returns and Power of the Reserve Bank to call for other Returns and Information**

Every banking company must, before the close of the month succeeding that to which it relates, submit to the Reserve Bank a return in the prescribed form and manner showing its assets and liabilities in India as at the close of business on the last Friday of every month, or, if that Friday be a public holiday, then at the close of business on the preceding working day.

The Reserve Bank may, at any time, by a notice in writing, require a banking company to furnish it, within the time specified by such notice or such further time as the Reserve Bank may allow, with statements and information regarding the business of such banking company and without prejudice to the generality of this power, may call for information every half-year regarding the classification of advances and investments of banking companies with regard to industry, commerce and agriculture.

### **Power of the Reserve Bank to publish Information**

When the Reserve Bank considers it desirable, in the interests of the public, it may publish any information obtained by it under Section 27 in such consolidated form as it may think fit.

### **Accounts and Balance-Sheet**

At the expiration of each calendar year, every banking company incorporated in India, in respect of all business done by it, and every banking company incorporated outside India in respect of business transacted through its branches in India, is required, under Section 29, to prepare, with reference to that year, a balance-sheet and profit and loss account as on the last working day of the year in the Forms set out in the Third Schedule or as near to it as circumstances admit.

In the case of a banking company incorporated outside India the profit and loss account may be prepared as on a date not earlier than two months before the last working day of the year.

The balance-sheet and profit and loss account must be signed by the manager or the principal officer of the banking company, and when there are more than three directors of the company, by at least three of those directors, or where there are not more than three directors, by all the directors ; this is in the case of a banking company incorporated in India. In the case of a banking company incorporated outside India, the balance-sheet and profit and loss account must be signed by the manager or agent of the principal office of the company in India.

It should be noted that though the balance-sheet of a banking company is not in accordance with Form "F" in the Third Schedule to the Indian Companies Act, 1913, yet the requirements of the Companies Act in respect of the balance-sheet and profit and loss account, must be complied with, except to the extent to which the Banking Companies Act conflicts with the provisions of the Companies Act, in which case the provisions of the Companies Act will not apply, and those of the Banking Companies Act will apply.

The Central Government is given power, under Section 29 of the Act, to amend the Forms set out in the Third Schedule of the Act, provided it has given not less than three months' notice of its intention to do so.

### **Audit**

Section 30 requires the balance-sheet and profit and loss account of a banking company to be audited by the auditor or auditors of the company. Such auditor must be a duly qualified auditor, as required under the Companies Act. For the purposes of the audit, the auditors shall have the same powers and duties and shall exercise the same function and be subject to the same liabilities and penalties as auditors of companies registered under the Companies Act.

In the case of a banking company incorporated outside India, the balance-sheet and profit and loss account must be audited by an auditor duly qualified under our Companies Act or by a person duly qualified to be an auditor under the law of the country in which the company has been incorporated.

The auditor shall have in his report to state whether or not books have been properly kept by the company and whether or not the information and the explanations demanded by him have been supplied to him by the directors of the company, and whether or not the balance sheet is in conformity with the law and is a true and correct view of the company's affairs and position. In addition to these matters, auditors are required to state in their report, in the case of a banking company incorporated in India.—

- (a) whether or not the information and explanations required by them have been found to be satisfactory ;

- (b) whether or not the transactions of the company which have come to their notice have been within the powers of the company ;
- (c) whether or not the returns received from branch offices of the company have been found adequate for the purposes of their audit ;
- (d) whether the profit and loss account shows a true balance of profit and loss for the period covered by such account ; and
- (e) any other matter which they, as auditors, consider it to be their duty to disclose to the shareholders of the company.

### **Submission of Returns**

Banking companies are required to publish, in the prescribed manner, the accounts and balance-sheet with the auditors' report thereon. Three copies of these documents shall be furnished as returns to the Reserve Bank within three months from the end of the period to which they relate or within such period of time as the Reserve Bank may have allowed by extension. The Reserve Bank cannot give an extension exceeding further three months.

### **Copies of Balance-sheets and Accounts must be sent to the Registrar of Companies**

When a banking company furnishes its balance-sheet and accounts it may or when it is a private company it shall (must) at the same time send to the Registrar of Companies three copies of the balance-sheet and accounts and of the auditor's report. When such copies are so sent the company need not file copies of the balance-sheet and accounts with the Registrar of Companies, and such copies so sent shall be chargeable with the same fees as if they were filed in accordance with Section 134.

When the Reserve Bank requires any additional statement or information in connection with the balance-sheet and accounts furnished under Section 31, the banking company must when supplying such statement or information, send a copy of it to the Registrar of Companies.

### **Display of Audited Balance-sheet by Companies incorporated outside India**

Every banking company incorporated outside India shall, not later than the first Monday in August of any year in which it carries on business, display conspicuously in its principal office and in every branch office in India a copy of its last audited balance-sheet and profit and loss account, and must keep a copy so displayed until replaced by a copy of the subsequent balance-sheet and profit and loss account so prepared.

Every such banking company must display copies of its complete audited balance-sheet and profit and loss account as soon as the same are available and it must keep the copies so displayed until copies of such subsequent accounts are available.

### **Accounting Provisions not Retrospective**

The provisions of the Act with regard to accounts are not retrospective i.e., such provisions do not apply to preparation of accounts and audit with regard to any accounting year which has expired prior to the coming into force of the Banking Companies Act, 1949.

### **Inspection**

In spite of any other provision to the contrary under Section 138 of the Indian Companies Act, 1913 the Reserve Bank may at any time, and must on being asked by the Central Government to do so, cause an inspection to be made by one or more of its officers, in respect of any banking company and its books and accounts. The Reserve Bank must supply to the banking company a copy of its report on such inspection. At such examination or inspection, every director or other officer of the banking company shall be bound to produce to the officer making the inspection all books, accounts and other documents in his possession or

power and relating to the affairs of the company, and shall also be bound to furnish such officer with any statements and information relating to the affairs of the banking company as such investigating officer may require of him to be furnished within such time as may be specified by the investigating officer.

Any person making an inspection may put on oath any director or other officer of the banking company and then examine any such officer or director regarding the business of the banking company.

The Reserve Bank must, if called upon by the Central Government to have an inspection to be made, and may, in any other case, report to the Central Government on any inspection made under Section 35. If the Central Government is then of the opinion that the interests of the banking company are at stake and that its affairs are being conducted to the detriment of the depositors, it may, after giving the banking company an opportunity of making a representation to it, by a written order prohibit the banking company from receiving fresh deposits or may order the Reserve Bank to apply, under Section 38 of the Act, for the winding up of the company. The Central Government may postpone the making of an order, or may cancel or modify any such order, upon such terms and conditions as it may think fit to impose.

The Central Government may publish the report (or a portion of it) submitted to it by the Reserve Bank, provided it has first given reasonable notice to the banking company.

### **Additional Powers and Functions of Reserve Bank**

The Reserve Bank has the power of cautioning or prohibiting banking companies generally, or any banking company in particular, against entering into any particular transaction or class of transactions. The Reserve Bank may also generally give advice to any banking company.

Whenever a request has been made to the Reserve Bank by the banking companies concerned, the Reserve Bank may assist, as intermediary or otherwise, in proposals for the amalgamation of the banking companies concerned.

The Reserve Bank may assist any banking company by granting it a loan or advance.

During the course of, or after the completion of any inspection into the affairs of a banking company, the Reserve Bank may, by a written order, require the banking company to call a meeting of its directors for considering any matter arising in the course of or out of such inspection or of meeting an officer of the Reserve Bank to discuss any such matter. The Reserve Bank may make such changes in the Company's management as it may consider necessary when the Reserve Bank discovers, after investigation into the affairs of the company, a state of affairs which requires a change in the management.

The Reserve Bank is required to make an annual report to the Central Government on the trend and progress of banking in the country, with its suggestions, if any, for the strengthening of banking business throughout the country.

The Reserve Bank may appoint such staff at such places as it may consider necessary for scrutinizing of the returns, statements and information furnished by banking companies under the Act, and generally to ensure the efficient working of its functions.

### **Suspension of Actions and proceeding against Banking Companies Moratorium**

In order that a banking company, which is only temporarily unable to pay its debts may not suffer by reason of a suit or legal proceeding against it, it is provided that such banking company may apply to the Court praying for a postponement of the action against it for a fixed period of time. The Court may then make such order as it thinks fit on such application, and may from time to time extend the period of such stay or suspension so that the total period of moratorium shall not exceed six months. A copy of the order of the Court has to

be forwarded to the Reserve Bank. No such application for moratorium can be made to the Court unless it is accompanied by a report of the Reserve Bank indicating that in the opinion of the Reserve Bank the Company will be able to pay its debts if the application is granted. The purpose of such report of the Reserve Bank is that of informing the Court of the true financial position of the Company. (Benares Bank case. I. L. R. 1939 All. 938). Relief, i.e., a moratorium may be allowed (for sufficient reasons), even if the application for moratorium is not accompanied by the report of the Reserve Bank; and when such relief is granted by the Court, the Court shall call for a report from the Reserve Bank regarding the affairs of the banking company, and after receipt of such report (of the Reserve Bank) the Court may either cancel any order already passed or make such further orders as may be just and proper under the circumstances.

Moratorium can be had only in the case of a company **temporarily** unable to pay its debts. (In re Bank of Calcutta Ltd., 53 C. W. N. 124; In re Benares Bank Ltd., I. L. R. 1939, All. 938). A company which has its registered office in Calcutta, i.e., in India, cannot apply for moratorium in the High Court at Dacca in Pakistan. (In re Bank of Commerce Ltd., 53, D. R. I. (C. W. N.) 126).

### Winding up by Court

Section 38 of the Banking Companies Act, 1949, provides that without prejudice to the provisions of Section 162 or Section 271 of the Indian Companies Act, 1913, and without prejudice to its powers under Section 37 of the Banking Companies Act, the Court shall order the winding-up of a banking company if it is unable to pay its debts, and the Court shall also order the winding-up if the Reserve Bank applies in this behalf to the Court.

The Reserve Bank may apply only if it is asked so to do by the order of the Central Government or if the company has failed to comply within due time with the demand contained in a notice in writing whereby a demand was made on the banking company to comply with the provisions of the Act within thirty days from the receipt of the notice.

Without prejudice to the provisions of section 163 of the Companies Act, 1913 a banking company shall be considered unable to pay its debts if it has refused to meet any lawful demand for payment at any of its offices or branches within two working days, if such demand is made at a place where there is an office, branch or agency of the Reserve Bank, or within five working days, if such demand is made elsewhere, and if the Reserve Bank certifies in writing that the company is unable to pay its debts.

A copy of every application by the Reserve Bank for a winding-up of a banking company shall be sent by the Reserve Bank to the Registrar of Companies.

### Reserve Bank becomes Official Liquidator

Where in any proceeding for the winding-up of a banking company by an order of the Court, the Reserve Bank has applied in this behalf, the Reserve Bank shall be appointed as the Official liquidator of the banking company in such proceeding.

### Stay of Proceedings in Winding-up

The Court shall not make any order staying the proceedings in relation to the winding-up of a banking company, unless it is satisfied that an arrangement has been made whereby the company can pay its depositors in full as their claims accrue.

### Report of Liquidator

When a winding-up order is made, the Official liquidator of the banking Company concerned must submit a preliminary report to the Court within two months from the date of the order giving the information required by Section 177B of the Indian Companies Act, so far as it is available to him, to enable the Court to order the payment of a preliminary dividend (distribution) if sufficient assets are available.

### **Power of the Court to Dispense with Meetings of Creditors or Contributories or to Dispense with the Appointment of Committee of Inspection**

The Court may, in the proceedings for winding-up of a banking company, dispense with any meetings of creditors or contributories or even with the appointment of a committee of inspection, if it is of the opinion that no object will be secured by undergoing the delays and expense.

### **Booked Depositors' Credits**

The Court shall presume that the amounts shown in the books of a banking company as standing to the credit of depositors are proved without requiring further proof from the depositors concerned unless it is shown by the official liquidator that there is reason for doubting any particular entry in the book.

### **Restriction on Voluntary Winding-up**

No banking company holding a licence may be voluntarily wound up unless the Reserve Bank certifies in writing that the company is able to pay in full all its debts to its creditors as they fall due. The Court shall, on the application of the Reserve Bank, order the winding-up of the banking company by the Court if at any stage during its voluntary winding-up it is not able to meet such debts as they accrue.

### **Procedure for Amalgamation of Banking Companies**

A banking company cannot be amalgamated with any other banking company, unless a scheme containing the terms of the amalgamation has been drafted and placed before the shareholders of each of the banking companies proposed to be amalgamated. These drafts must be placed separately before the shareholders of each of the companies, and has got to be approved by a majority in number of the shareholders representing two-thirds in value of the shareholders of each of these companies, present in person or proxy.

Notice of the holding of the meeting of the shareholders must be given to every shareholder of each of the banking companies concerned as required by the Articles of Association. Such notice must specify the time, place and object of the meeting, and shall also be published at least once a week for three consecutive weeks in at least two newspapers circulating in the locality or localities where the registered offices of these companies are situated, one of such newspapers being in a language commonly understood in the locality or localities.

Any shareholder who has voted against the scheme of amalgamation or has given notice in writing, before or at the meeting, to the company concerned or to the Chairman or presiding officer at the meeting to the effect that he dissents from the scheme of amalgamation, shall have a right, if the scheme is sanctioned by the Reserve Bank, to claim from the banking company concerned, in respect of the shares held by him in that company, the value of these shares as fixed by the Reserve Bank at the time it sanctioned the scheme. Such determination of the value by the Reserve Bank shall be deemed to be final for all purposes. If the Scheme is approved by the requisite majority of shareholders, it must be submitted to the Reserve Bank for its sanction; if so sanctioned it shall be binding on the banking Companies and its shareholders.

Where the scheme of amalgamation is approved and sanctioned by the Reserve Bank, the Reserve Bank must transmit a copy of its order sanctioning the scheme to the Registrar of Companies with whom the banking companies have been registered. The Registrar shall then strike off the name of the company (which is so amalgamated).

When the Reserve Bank has sanctioned the scheme of amalgamation, the property of the amalgamated banking company gets transferred to and becomes vested in the other banking company which has absorbed its undertaking; so also shall the liabilities of the



amalgamated banking company be transferred to and become the liabilities of the other or the absorbing company. The order of the Court sanctioning the scheme of amalgamation may lay down its own terms.

### **Restriction on Compromise or Arrangement between Banking Company and its Creditors**

A compromise or arrangement between a banking company and its creditors or any class of its creditors or between it and its members or any class of its members cannot be sanctioned by the Court, unless such compromise or arrangement is certified by the Reserve Bank as not being detrimental to the interests of the depositors of the company.

In a scheme of arrangement by a banking Company under Sec. 153 of the Companies Act, the Court has discretion. Moreover a certificate from the Reserve Bank is essential under Sec. 45 of the Banking Companies Act. (*Venkatasubbier v. Bank of Hindustan*, 1950, 1M. L. J. 34).

### **Special Provisions relating to Speedy Disposal of Winding-up Procedure**

The High Court with the necessary jurisdiction, according to the place where the registered office of the banking company is situated, or in the case of a foreign banking company the High Court having jurisdiction in view of the place of business of such company, shall have the jurisdiction to entertain any matter relating to or arising out of the winding-up of the company.

The Court can decide all claims by or against banking companies, including claims by or against any of its branches in India. All questions of priorities, title, law or fact, which may relate to or arise in the winding-up, can be decided by the Court with the necessary jurisdiction. An appeal lies from the decision or order of the Court.

Any person who has taken part in the formation or promotion of the banking company can be tried summarily. So also any past or present director, manager or officer of the banking company can be tried summarily by the Court. The offence, however, must be punishable under the Indian Companies Act, 1913, with imprisonment not exceeding two years or with fine not exceeding one thousand rupees. At any such trial the Court need not summon any witness, if it is satisfied that the evidence of such witness will not be material. Nor is the Court bound to adjourn a trial unless the Court considers it necessary. The Court shall, before passing sentence, record judgment embodying the substance of the evidence and also the particulars mentioned in Section 263 of the Criminal Procedure Code.

It is open to the Reserve Bank, to tender advice to the company in its winding-up.

The official liquidator may take into his possession or control all property, effects and actionable claims of a banking company in winding-up; the official liquidator may, in writing, request the District Magistrate with the necessary jurisdiction, to take possession of such property effects or claims or books or other documents and forward the same to the official liquidator. The District Magistrate is empowered to take all necessary steps.

In computing the period of limitation for any suit or application by a banking company, the period of one year immediately prior to the date of the winding up order shall be excluded. [Sec. 45 F].

There is a suspension of limitation for a period of one year immediately preceding the date of winding-up order. If the time has already run out before this period of one year, there can be no question of suspension of the period of limitation, because there is nothing now (left) to suspend. "Suspension" suggests that there is something (in existence) which can be suspended. The question of suspension can arise only when the period of limitation expires within or after this period of one year. (*Pioneer Bank v. Banerjee* 54 C. W. N. 710).

The Court with the jurisdiction can make Rules which must be consistent with the Banking Companies Act, 1949, as amended.

The Court may enforce its orders in the same manner in which decrees in any suit may be enforced.

### Miscellaneous

Whoever in any return, balance-sheet or other document required under the Act, willfully makes a statement, which is false in any material particular, with knowledge of its falsity, or willfully omits to make a material statement, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine. If any person fails to produce any book, account or other document, or to furnish any statement or information which he is bound to produce or furnish, or to answer any question, regarding the business of a banking company, which he is asked by an officer making an inspection under Section 35 of the Act, he shall be punishable with a fine which may extend to five hundred rupees in respect of each offence, and if he persists in such refusal he shall be liable to a further fine which may extend to fifty rupees for every day during which the offence continues.

If any deposits are received by a banking company in contravention of an order made by the Central Government under clause (a) of sub-section (4) of section 35 of the Act, every director or other officer of the banking company shall be deemed guilty of such contravention and shall be punishable with a fine which may extend to twice the amount of the deposit so received, unless he proves that the contravention took place without his knowledge or that he had exercised all diligence to prevent the contravention. If any other provision of the act is contravened or a default made, every director and other officer of a banking company who is knowingly a party to the default shall be punishable with a fine not exceeding five hundred rupees, and where the contravention or default is a continuing one he shall be punishable with a further fine not exceeding fifty rupees for every day during which it continues.

If any banking company fails to comply with the provisions of Section 24 or Section 25, the Reserve Bank shall by a written notice call upon the banking company to comply with the provisions of those sections or section within thirty days from the receipt of the written notice, and if the banking company fails to do so, the Reserve Bank may apply under Section 38 for winding-up of the company.

No Court shall try any offence unless a complaint in writing is made to it by an officer of the Reserve Bank generally or specially authorised by the Reserve Bank to do so. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any such offence.

A Court imposing any fine under the Act may order that the whole or any part of that fine shall be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding of the person who gave the information resulting in the fining of the offender.

The exemptions conferred on private companies by Sections 17, 77, 83B, 86H, 91B, and 91D, and sub-section (5) of section 144 of the Indian Companies Act, 1913 shall, not apply in favour of a private company which is a banking company.

The Central Government may make Rules under the Act, after consultation with the Reserve Bank, in respect of all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of the Banking Companies Act. Such Rules shall be published in the Official Gazette. Such Rules may also provide for the details to be included in the returns under the Banking Companies Act and the mode in which returns shall be submitted.

Section 54 of the Banking Companies Act, 1949, confers protection on the Central Government, the Reserve Bank, and officers for anything done in good faith or intended to be so done in pursuance of the Banking Companies Act, 1949. No suit or other legal proceeding shall lie against the Reserve Bank or its officers or the Central Government.

## FORM OF BALANCE SHEET

## THE THIRD SCHEDULE

(See section 29)

## FORM A

## Form of Balance-sheet

## CAPITAL AND LIABILITIES

## PROPERTY AND ASSETS

	Rs. a. p.	Rs. a. p.		Rs. a. p.	Rs. a. p.
<b>CAPITAL (a)—</b>			<b>CASH :</b>		
Authorised Capital .....			In hand and with Reserve Bank (including foreign currency notes)		
Shares of Rs. .... each ..					
Issued Capital .. Shares of Rs. .. each			Balances with other Banks (showing whether on deposit or current account) :		
			(i) in India.		
Subscribed Capital .....			(ii) outside India.		
Shares of Rs. .... each.....			<b>Money at Call and Short Notice</b>		
Amount called up at Rs. .... per share .. .. .					
Less calls unpaid .. .. .			<b>Bills Discounted and purchased.</b>		
			(e)		
Add forfeited shares .. .. .			(Other than Treasury Bills of the Central and State Governments).		
<b>RESERVE FUND (b)</b>			(i) payable in India.		
<b>Deposits and other Accounts:</b>			(ii) payable outside India.		
Fixed Deposits .. .. .			<b>Investments</b> (stating mode of valuation, e.g., cost or market value).		
Savings Bank Deposits .. .. .			(f)		
Current Accounts and Contingency (unadjusted) accounts			(i) Securities of the Central and State Governments and Trustee securities, including Treasury Bills of the Central and State Governments.		
<b>BORROWINGS FROM OTHERS BANKS, AGENTS, ETC. :</b>			(ii) Shares (classifying into preference, ordinary, deferred and other classes of shares and showing separately shares fully paid up and partly paid up).		
(i) in India.			(iii) Debentures or Bonds.		
(ii) outside India .. .. .			(iv) Other investments (to be classified under proper heads)		
<b>Particulars :</b>			(v) Gold.		
(i) Secured (stating the nature of security) .. .. .			<b>Loans Advances, Cash Credits and Overdrafts</b> (other than bad and doubtful debts for which provision has been made to the satisfaction of the auditors).		
(ii) Unsecured .. .. .			(i) in India.		
<b>BILLS PAYABLE</b> .. .. .			(ii) outside India.		
<b>BILLS FOR COLLECTION</b>			<b>Particulars:</b>		
<b>BEING BILLS RECEIVABLE</b>			(i) Debts considered good in respect of which the bank is fully secured.		
<b>AS per contra.</b>			(ii) Debts considered good for which the bank holds no other security than the debtors' personal security.		
(i) payable in India .. .. .					
(ii) payable outside India. ..					
<b>Other Liabilities (to be specified). (c)</b>					
<b>Acceptances, Endorsements and other obligations per contra.</b>					

## FORM A—Contd.

## CAPITAL AND LIABILITIES

## PROPERTY AND ASSETS

Rs. a. p. Rs. a. p.

Rs. a. p. Rs. a. p.

## Particulars—(contd.)

## Profit and loss :

Less appropriation thereof .. \_\_\_\_\_

## Contingent Liabilities. (d) ..

(iii) Debts considered good, secured by the personal liabilities of one or more parties in addition to the personal security of the debtors.

(iv) Debts considered doubtful or bad, not provided for

(v) Debts due by directors or officers of the bank or any of them either severally or jointly with any other persons ..

(vi) Debts due by companies or firms in which the directors of the bank are interested as directors, partners or managing agents or, in the case of private companies, as members

(vii) Maximum total amount of loans, including temporary advances made at any time during the year to directors or managers or officers of the company.

(viii) Maximum total amount of loans, including temporary advances granted during the year to the companies or firms in which the directors of the bank are interested as directors, partners or managing agent or, in the case of private companies, as members ..

(ix) Due from banks. ..

## Bills for collection being Bills receivable as per contra :

(i) payable in India.

(ii) payable outside India. \_\_\_\_\_

## Acceptances, Endorsements and other obligations per contra.

## Premises less depreciation (g)

## Furniture and fixtures less depreciation (g) ..

## Other assets, including silver (to be specified) (h)

## Non-Banking Assets acquired in satisfaction of claims (stating mode of valuation) (i)

## Profit and Loss .. \_\_\_\_\_

Total .. .. \_\_\_\_\_

Total .. .. \_\_\_\_\_

## NOTES

## (a) Capital :—

- (i) The various classes of capital, if any, should be distinguished.
- (ii) Shares issued as fully paid-up pursuant to any contract without payments being received in cash should be stated separately.
- (iii) Where circumstances permit, issued and subscribed capital and amount called up may be shown as one item, e.g., Issued and Subscribed Capital. .... Shares of Rs. .... paid up.
- (iv) In the case of banking companies incorporated outside India, the amount of deposit kept with the Reserve Bank of India under subsection (2) of section 11 of the Banking Companies Act, 1949, should be shown under this head ; the amount, however, should not be extended to the outer column.

- (b) The Reserve fund maintained under section 17 of the said Act should be shown separately.
- (c) Under this heading are to be included such items as the following, to be shown under separate headings suitably described : pension or insurance funds, unclaimed dividends, advance payments and unexpired discounts, liabilities to subsidiary companies and any other liabilities.
- (d) These should be classified under the following categories :—
- (i) Claims against the banking company not acknowledged as debts.
  - (ii) Money for which the bank is contingently liable showing separately the amount of any guarantee given by the banking company on behalf of directors or officers.
  - (iii) Arrears of cumulative preference dividends.
  - (iv) Liability on Bills of Exchange re-discounted.
  - (v) Liability on account of outstanding Forward Exchange Contracts.
- (e) Particulars as under "Loans, Advances, Cash Credits and Overdrafts" are to be shown under this heading.
- (f) Where the value of the investments shown in the outer column of the balance-sheet is higher than the market value, the market value shall be shown separately in brackets.
- (g) Bank premises wholly or partly occupied for the purposes of business should be shown against "Premises less depreciation." In the case of fixed capital expenditure, the original cost, and additions thereto and deductions therefrom during the year should be stated, as also the total depreciation written off. Where sums have been written off on a reduction of capital or revaluation of assets, every balance-sheet after the first balance-sheet subsequent to the reduction or revaluation should show the reduced figures with the date and amount of reduction made. Furniture, fixtures and other assets which have been completely written off need not be shown in the balance-sheet.
- (h) Under this heading may be included such items as the following, which must be shown under headings suitably described : preliminary, formation and organisation expenses, development /expenditure, commission and brokerage on shares, interest accrued on investments but not collected, investments in shares of subsidiary companies and any other assets.
- (i) Value shown shall in no case exceed market value.

References to India shall be construed as including references to the Acceding States to which the Banking Companies Act, 1949, for the time being extends.

### FORM B

#### FORM OF PROFIT AND LOSS ACCOUNT

Profit and Loss Account for the year ended . . . . . December

EXPENDITURE	INCOME (LESS PROVISION MADE DURING THE YEAR FOR BAD AND DOUBTFUL DEBTS).
Interest paid on deposits. . .	Interest and Discount. . .
Salaries and Allowance (showing separately salaries and allowances to managing director or manager.) . .	Commission, Exchange and Brokerage. . .
Directors' Fees and allowances. . .	Rents. . .
Local Committee members' fees and allowances . .	Transfer from contingencies account. . .
Provident Fund. . .	
Rent, Taxes, Insurance, Lighting, etc. . .	
Law Charges. . .	Profit made on sale of investments, gold and silver, . .
Postage, Telegram and Stamps. . .	land, premises and other assets. . .
Auditors' Fees. . .	Profit made on revaluation of investments, gold . .
Depreciation on Bank's Property . .	and silver, land, premises and other assets. . .
Repairs to Bank's Property. . .	Income from non-banking assets, and Profit from . .
Stationery, Printing, Advertisement, etc. . .	sale of or dealing with such assets. . .
Loss from sale of or dealing with non-banking assets. . .	
Other Expenditure. . .	Other receipts . .
Balance of Profit. . .	Loss (if any). . .
Total . .	Total . .

**CHAPTER XXXIV**  
**FACTORY LAW**  
**THE INDIAN FACTORIES ACT, 1948.**

**Object of the Act**

The Factories Act is meant for the protection of factory workers and for the regulation of conditions and hours of work in factories. The health and safety of the worker, especially of women and youthful workers, require sufficient protection. The Indian Factories Act, 1948, seeks to secure these items of protection, for the good of the worker as also for the ultimate good of the employer.

**History of Factory Legislation in India**

In 1881, the first Factory Act was passed. Under it children of eight upwards were allowed to work in Factories even for nine hours a day. Then was passed the Factory Act of 1911, under which a weekly holiday for all factory workers was provided. For women workers a maximum of eleven hours' work per day was prescribed (with half an hour's rest during the period of work). Thus, it may be observed, the lot of the poor factory worker was hard. The maximum hours of work for children, fixed at seven hours, was far from ideal.

The Indian Factories Act of 1934, based on the recommendations of the Royal Commission on Labour in India, brought several important changes. That Act provided regulations for health and safety of the worker, and cleanliness, proper ventilation on the premises of factories, prevention of overcrowding, having of proper fencing so as to guard against dangerous machinery, proper lighting conditions, restrictions on hours of work, provisions regarding rest, holidays, better conditions relating to female labour, special provisions for children and prohibition of child labour.

Then was passed the Factories Act of 1948, which made further improvements in the law. The prescribed registers have to be properly kept by employers and returns have to be filed with the State Governments concerned, having the power to call for such Returns or ask for the necessary information.

**Definitions and Explanations (Sec. 2)**

**Adult**

An 'adult' is a person who has completed his eighteenth year of age.

**Adolescent**

An 'adolescent' is a person who has completed his fifteenth year of age but has not completed the eighteenth year.

**Child**

Any person who has not completed his fifteenth year of age is called a 'child'.

**Young Person**

A 'young person' is any person who is either a child or an adolescent, i.e., any person who has not completed his fifteenth year of age, or any person who has completed his fifteenth year but not the eighteenth year of age.

**Day**

'Day' means a period of 24 hours beginning at midnight.

**Week**

'Week' means a period of 7 days beginning at midnight on Saturday night or such other night as may be approved in writing for a particular area by the Chief Inspector of Factories.

**Power**

'Power' means electrical energy or any other form of energy which is mechanically transmitted and is not generated by human or animal agency.

**Prime Mover**

'Prime Mover' means any engine, motor or other appliance which generates or otherwise provides power.

**Machinery**

'Machinery' means all appliances capable of generating, transforming, transmitting or applying energy or power.

**Transmission Machinery**

'Transmission Machinery' means any sharp drum, pulley, wheel, system of pulleys, coupling clutch, driving belt or other appliances, device, by which the motion of a prime mover is transmitted to or is received by any machinery.

**Worker**

'Worker' means a person employed directly or through any agency, whether for wages or otherwise, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

**Factory**

'Factory' means any premises (including its precincts), where ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on; or where twenty or more workers are working or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on. But a mine is not a factory; nor is a railway running shed a factory.

**Relay**

A 'relay' is a set of workers where work of the same kind is carried out by two or more sets of workers during different periods of the day.

**Occupier of Factory**

'Occupier of a factory' is a person who has **ultimate control** over the affairs of the factory. But the manager of a factory who resides in a portion of the premises of the factory has been held not to be an occupier within the meaning of section 2. (*Emperor v. Magniram* 29 Bom. 423). A managing agent of a factory is an occupier. An owner of a factory who has left the whole conduct of the affairs of his factory to a manager is an occupier within the meaning of section 2, in so far as he has **ultimate control** over its affairs. (*Emperor v. Modi*, 1930, 33 Bom. L. R. 309).

**Power of State Government to Declare Different Departments of a Factory to be Separate Factories. (Sec. 3)**

The State Government concerned may, by order in writing, declare that different departments or branches of a specified factory shall be treated as separate factories for all or any of the purposes of the Factories Act.

**Approval, Licensing and Registration of Factories (Secs. 6 and 7)**

The State Government may make rules under which the previous permission (in writing) from it or from the Chief Inspector of Factories is required to be obtained for the site of a factory (which is to be established) and for its construction or extension. Rules may also be made requiring the submission of plans and specifications, the registration and licensing of factories, the renewal of licenses and the fees payable therefor.

No licence is granted or renewed unless, at least fifteen days before he begins to occupy or use any premises as a factory, the occupier of the factory has sent a notice (in writing) to the Chief Inspector of Factories, stating (1) the name and situation of the factory, (2) the name and address of the occupier, (3) the address to which communications relating to the factory may be sent, (4) the nature of the manufacturing process, (5) the name of the manager of the factory, (6) the number of workers likely to be employed in the factory, (7) the average number of workers employed during the last twelve months, (8) and other prescribed particulars. (Sec. 7).

**Provisions relating to Health, Safety and Welfare of the Workers  
(Secs. 11-50)**

(1) Every factory must be kept clean and free from effluvia arising from any drain, privy or other nuisance. Washing, sweeping, use of disinfectants, drainage, painting, re-painting, varnishing, re-varnishing, white-washing or colour-washing should be resorted to. (Sec. 11).

(2) Effective arrangements must be made for the disposal of wastes and effluents. (Sec. 12).

(3) There should be effective ventilation and suitable temperature kept in every work-room. (Sec. 13).

(4) Effective measures must be provided for prevention of inhalation or accumulation of dust and fumes in workrooms. (Sec. 14).

(5) The State Government may make rules for all factories in which the humidity of the air is artificially increased, prescribing standards of humidification and cooling. (Sec. 15).

(6) There must not be overcrowding in any room so as to be injurious to the health of the workers therein. There must be at least three hundred and fifty cubic feet (for existing factories) or at least five hundred cubic feet (for new factories) of space for every worker. (Sec. 16).

(7) There must be sufficient and suitable lighting. (Sec. 17).

(8) There must be satisfactory arrangement for wholesome drinking water. (Sec. 18).

(9) Separate enclosed accommodation of latrines and urinals for male and female workers must be provided for. (Sec. 19).

(10) There must be clean and hygienic spittoons. (Sec. 20).

(11) Machinery must be safely fenced. (Sec. 21).

(12) Examination of any part of machinery may be made under section 22—(Sec. 22)

(13) Unless fully instructed as to the dangers arising in connection with the use of a dangerous machinery, no young person can be made to work at any dangerous machine. Such person must, even if sufficiently trained, be under adequate supervision by a person who has thorough knowledge and experience of the machine. (Sec. 23).

(14) Suitable striking gear or other efficient mechanical appliance must be provided and maintained and used to move driving belts. Suitable devices for cutting off power in emergencies from running machinery must be maintained in every work-room. (Sec. 24). And section 26 provides for casing of machinery so as to prevent accident or danger.



(15) Section 27 prohibits employment of women and children for pressing cotton where a cotton-opener is at work.

(16) Hoists and lifts should be of good mechanical construction and should be sufficiently protected by enclosures fitted with gates. (Sec. 28).

(17) Cranes and other lifting machinery must be sound and well constructed. (Sec. 29) Under section 30 speeds of different types are to be given to each machine and mentioned on notices to be kept near each machine, where the process of grinding is carried on.

(18) All floors, steps, stairs, passages and gangways must be of sound construction and properly kept and maintained; hand-rails must be provided where necessary. (Sec. 32).

(19) Pits, sumps, fixed vessels, tanks, openings, must be securely covered or securely fenced. (Sec. 33).

(20) No person should be employed to lift, carry or move any load so heavy as to be likely to cause him injury. (Sec. 34).

(21) Screens or suitable goggles must be provided for the protection of persons employed on or in immediate vicinity of mechanical or other processes which involve any danger of injury to the worker's eyesight. (Sec. 35).

(22) Precautions must be taken against dangerous fumes, by manholes or other effective means of egress. (Sec. 36).

(23) Effective enclosures of the plant or machinery, removal or prevention of accumulation of dust, gas, fume or vapour, exclusion or effective enclosure of all possible source of ignition, with a view to preventing any explosion which might be the result of dust, gas, fume or vapour produced through any manufacturing process, are required by the provisions of section 37.

(24) Adequate and suitable facilities for washing must be provided and maintained for the use of workers therein. There must be separate and adequately screened facilities for the use of male and female workers. There must be cleanliness. (Sec. 42).

(25) There must be adequate sitting accommodation and facilities for workers to rest while doing their work in a standing position. (Sec. 44).

(26) Section 45 provides for first aid appliances for workers.

(27) The State Government is empowered, under section 46, to provide, by rules, that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens must be provided for the use of the workers. The employer is then bound to maintain such canteen or canteens. (Sec. 46).

(28) Section 47 provides for shelters, rest rooms and lunch rooms for workers in every factory wherein ordinarily more than one hundred and fifty workers are employed. There must be suitable provision for drinking water also.

(29) In every factory in which more than fifty women workers are ordinarily employed there must be provided and maintained a suitable room or rooms for the use of children who are under the age of six years while their mothers are at work in the factory. Such rooms must provide adequate accommodation, must be sufficiently lighted and ventilated and must be clean and sanitary. Women trained in the care-taking of children and infants must be in charge of such rooms. (Sec. 48).

(30) In every factory in which five hundred or more workers are ordinarily employed, the occupier in charge of the factory must employ in the factory the prescribed number of welfare officers, i.e., as many welfare officers as are required under the rules made by the State Government to be so employed.

### Working Hours

Section 51 of the Factories Act provides that no adult worker can be made to work, or allowed to work, for more than forty-eight hours in any week. No adult worker can be

required or allowed to work for more than nine hours in any day. (Sec. 54). The period of work for adult workers each day must be so fixed that no period shall exceed five hours and no worker shall work or be allowed to work for more than five hours before he had had an interval of rest for at least half an hour. (Sec. 55). And sec. 56 provides for a proper spread-over of work. The periods of work must be so spread over or arranged that inclusive of his intervals of rest they shall not spread over more than ten and a half hours in any day, though the Chief Inspector may, for reasons given in writing, increase the spread-over to twelve hours.

When a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect of the over-time work, be entitled to wages at the rate of twice his ordinary rate of wages. 'Ordinary rate of wages' are the basic wages plus such allowances including the cash equivalent of the advantage accruing through the concessional sale to workers of foodgrains and other articles, as the worker is for the time being entitled to, but not including bonus. (Sec. 59).

No adult worker shall be required or allowed to work in any factory on any day on which he has already been working in any other factory, except in such circumstances as may be prescribed. (Sec. 60).

A notice of periods of work for adult workers must be displayed and correctly maintained in every factory. The notice must show clearly for every day the periods during which adult workers are required to work. (Sec. 61).

### **Holiday for Adult Workers**

Every adult worker in a factory must be allowed a holiday during the week. No adult worker shall be made or allowed to work on the first day of the week unless he had a holiday for at least one whole day during the three days before the first day of the week or unless he is going to be given a holiday on the day next after the first day of the week. (Sec. 52). A notice must have been delivered by the manager of the factory to the Inspector regarding the intention to require the worker to work on that day; such notice must be displayed in the factory also. (Sec. 52). Sec. 53 provides for compensatory holidays, i.e., holidays in lieu of the holidays otherwise due and lost.

### **Register of Adult Workers. (Sec. 62)**

The manager of every factory must keep a register of adult workers, so that it may be available to the Inspector at all times during working hours, when any work is being carried on in the factory. The Register must contain the following particulars:—

- (a) the name of each adult worker in the factory;
- (b) the nature of his work;
- (c) the group, if any, in which he is included;
- (d) where his group works on shifts, the relay to which he is allotted;
- (e) such other particulars as may be prescribed.

### **Further Restrictions on Employment of Women**

Section 66 provides further restrictions on employment of women. No woman worker shall be allowed to work or employed in any factory except between the hours of 6 A.M. and 7 P.M. This is subject, however, to any notification which the State Government may make in the Official Gazette, varying these limits of 6 A.M. and 7 P.M., but no such variation shall authorise the employment of any woman worker between the hours of 10 P.M. and 5 A.M. In the case of women working in fish-curing or fish-canning factories, the State Government may make rules allowing women to work even during the otherwise prohibited period, i.e., beyond the specified limits.

### **Restrictions on Employment of Young Persons**

No child who has not completed his fourteenth year shall be required or allowed to work in any factory. (Sec. 67). A child who has completed his fourteenth year of age or an adolescent must not be allowed to work in any factory unless a certificate of fitness for such work is with the manager of the factory. (Sec. 68). And under sec. 69 provision is made for certificate of fitness in case of such child worker. An adolescent who has been granted a certificate of fitness to work in a factory is to be regarded as an adult. Where an adolescent has not been given such certificate of fitness he is regarded as a child. That is the effect of a certificate of fitness being given or not given. (Sec. 70). Then Sec. 71 provides that no child shall be employed or permitted to work in a factory for more than four and a half hours in any day or between the hours of 7 P.M. and 6 A.M. The period of work of all children shall be limited to two shifts which shall not overlap or spread over more than five hours each. Each child shall be employed in only one of the relays which must not, except with the previous sanction in writing of the Chief Inspector, be changed more frequently than once in a period of thirty days. No child can be required or allowed to work in any factory on any day on which he has already been working in another factory.

Section 72 provides that every factory must display and correctly maintain a notice of the periods of work for children, where there are child-workers, showing clearly for every day the periods during which children may be required or allowed to work. Section 73 requires a register of all child-workers in the factory. The name of each child, the nature of his work, the group of workers in which he has been included, the relay to which he is allotted, and the number of his certificate of fitness must be stated in the register of child-workers.

### **Leave with Wages**

Every worker who has completed a period of twelve months' continuous service at the factory is entitled, during the subsequent period of twelve months, to leave with wages. An adult worker can claim one day for every twenty days of work done by him during the previous period of twelve months subject to a minimum of ten days. A child-worker can claim leave at the rate of one day for every fifteen days of work done by him during the previous twelve months, subject to a minimum of fourteen days. The period of leave shall be inclusive of any holiday or holidays that may fall during the period of leave. [See section 79 for further details.] For the leave allowed to a worker he shall be paid at a rate equal to the daily average of his total full-time earnings, exclusive of any overtime earnings and bonus, but inclusive of dearness allowance and the cash equivalent of any advantage received by him, e.g., of foodgrains or other articles at concession sold to him, for the days he worked during the month immediately preceding his leave.

### **Notice of certain Accidents**

Section 88 provides that where in any factory an accident occurs which causes death, or which results in any bodily injury preventing the worker from working for a period of forty-eight hours or more, the manager of the factory must send to the prescribed authority a notice of the accident.

### **Determination of Occupier for Purposes of Punishment**

Where the occupier of a factory is a firm or an association of individuals, any one of the individual partners or members thereof may be prosecuted and punished for any offence for which the occupier is liable. (Sec. 100).

Where the occupier is a company, any of the directors of the company, or if it be a private company any one of its shareholders, may be prosecuted and punished for an offence for which the occupier is punishable.

### **Exemption of Occupier or Manager from Liability**

Where the occupier or manager of a factory is charged with an offence punishable under the Factories Act, it is open to him to give the prosecutor not less than three clear days'

notice in that behalf and say that he is really not responsible for the charge levelled against him but that some other person is responsible for the offence. He can then have that person brought before the Court at the time appointed for hearing the charge. (Sec. 101).

### **Limitation of Prosecutions**

No court can take cognizance of any offence under the Factories Act if the complaint regarding it is not made within three months of the date on which the alleged offence came to the knowledge of the Inspector. If the offence consists of disobeying a written order made by an Inspector, the complaint regarding its commission can be made within six months of the date on which the offence is alleged to have been committed. (Sec. 106).

**CHAPTER XXXV**  
**LAW RELATING TO PAYMENT OF WAGES**  
**THE PAYMENT OF WAGES ACT, 1936**

**Object of the Act**

The object of the Act is to bring about an easy and expedient mode of payment of wages to industrial workers. Such workers are saved the trouble or resorting to unnecessary and protracted litigation. It is here suggested that the Act should be made applicable, and it is to be hoped that soon the legislature may amend the Act and make it applicable, to non-industrial workers also. The Act does not apply to wages payable in respect of a wage-period which, over such wage-period, average two hundred rupees a month or more.

**Definitions and Explanations**

**Industrial Establishment**

'Industrial Establishment' means and includes any tramway or motor omnibus service ; dock wharf or jetty ; inland steam-vessel ; mine, quarry or oil-field ; plantation ; workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale.

**Plantation**

'Plantation' means any estate which is maintained for the purpose of growing cinchona, rubber, coffee or tea, and on which twenty-five or more persons are employed for that purpose.

**Wages**

'Wages' mean any remuneration, capable of being expressed in terms of money, payable, under the terms of the contract of employment, express or implied, to an employee. It includes any bonus or additional remuneration payable to the employee as also any sum payable to the employee by reason of the termination of his employment. Wages do not include the value of any house accommodation, supply of light, water, medical attendance or other amenity, or of any service excluded by an order of the State Government. Any contribution made by the employer to any pension fund or provident fund is not wages. Travelling allowance, travelling concession or any gratuity payable at the time of termination of service is also excluded from the definition of 'wages'.

**Responsibility for Payment of Wages**

Every employer, governed by the Payment of Wages Act (which applies to factory workers and to railway employees and to such other class of workers employed in an industrial establishment or in any class or group of industrial establishments as the State Government by notification in the Gazette may have declared) is bound to pay the agreed wages, if due payable under the contract or the terms of employment, to his employees. Sec. 3 of the Act makes every employer liable to pay the wages. Where the employer is not a contractor and the worker works in a factory which is under a manager, the manager shall be responsible for the payment of the wages. In an industrial employment where there is a person responsible to the employer for the supervision and control of the industrial establishment, such person so supervising shall be responsible for the payment of the wages. In the case of a railway, if a person has been nominated in charge of a local area, such person shall be responsible for the payment of the wages. (Sec. 3 of the Payment of Wages Act).

**Fixation of Wage Periods**

A person responsible for the payment of the wages (as seen in the preceding notes) must fix periods (known under the Act as wage-periods) in respect of which such wages are payable and shall be paid. No wage period can exceed one month. (Sec. 4).

**Time of Payment of Wages (Sec. 5)**

The wages of an employee in any railway, factory or industrial establishment, must be paid before the expiry of the seventh day, if there are less than one thousand employees in that employment ; and in the case of any other railway, factory or industrial establishment, the wages must be paid before the expiry of the tenth day ; this seventh day or the tenth day shall be reckoned from the last day of the wage-period in respect of which the wages are payable.

Where the employment of any worker is terminated by or on behalf of the employer, his wages must be paid before the expiry of the second working day from the day on which the employment is terminated.

All payment of wages must be made on a working day.

All wages must be paid in current coin or currency notes.

**Deductions from Wages**

Wages must be paid without any deductions except those authorised under the Payment of Wages Act. (Sec. 7).

Any payment made by a worker to his employer or an agent of his employer is regarded as a deduction from wages. [Sec. 7].

Deductions from wages of an employed person can only be made as provided by sub-section (2) of section 7 of the Payment of Wages Act. Deductions may be of the following kinds :—

- (1) Fines ;
- (2) Deductions for absence from duty ;
- (3) Deductions for damage to or loss of goods which had been entrusted to the worker for custody, or for loss of money for which he is required to account, or for such damage or loss as is the result of the worker's neglect or default ;
- (4) Deductions for house accommodation supplied by the employer to the worker ;
- (5) Deductions for such amenities and services supplied by the employer as the State Government may, by general or special order, authorize ;
- (6) Deductions of income-tax payable by the worker ;
- (7) Deductions for recovery of advances or for adjustment of over-payments of wages ;
- (8) Deductions required to be made by order of a Court or other authority competent to make such order ;
- (9) Deductions for subscriptions to, and for repayment of advances from, any Provident Fund to which the Provident Funds Act, 1925, applies, or any recognized Provident Fund as defined in section 58A of the Indian Income Tax Act, 1922, or any Provident Fund approved in this behalf by the State Government during the continuance of such approval ;
- (10) Deductions for payments to co-operative societies approved by the State Government or to a scheme of insurance maintained by the Indian Post Offices ;
- (11) Deductions made with the written authority of the worker in furtherance of any War Savings Scheme approved by the State Government for the purchase of securities of the Government of India or the Government of the United Kingdom. [Sec. 7].

No employer can impose any fine on any worker except in respect of such acts or defaults of the worker as the employer, with the previous sanction of the State Government or other prescribed authority, may have specified by notice. A notice specifying such acts and defaults must be exhibited on the premises of the employer, or in the case of a railway employment at the prescribed place or places. The worker must be given an opportunity of showing cause against the imposition of the fine before any fine can be imposed on him. The total amount of the fine which may be imposed in any particular wage-period of a worker must not exceed an amount equal to half-an-anna in the rupee of the wages payable to him in respect of that wage-period. No person under the age of 15 years can be fined. No fine can be recovered from a worker by instalments or after the expiry of sixty days from the day on which it was imposed. Every fine shall be deemed to have been imposed on the day of the act or default in respect of which it was imposed. The person responsible for the payment of wages must keep a Register in which all fines and all realizations thereof must be recorded. All such realisations must be applied only to such purposes beneficial to the employees of the factory or establishment as are approved by the prescribed authority.

Deductions may be made out of wages, on account of the absence of a worker from the place or places where, by the conditions of his employment, he was required to work, provided such absence is for the whole or part of the period during which he is so required to work. The amount of such deduction shall not bear to the wages payable to the worker (in respect of the wage-period for which the deduction is made) a larger proportion than the period for which he was absent bears to the total period.

#### **Decision of Claims arising out of Deductions from Wages or Delay in Payment of Wages (Section 15)**

The State Government may, by notification in the Official Gazette, appoint any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a Civil Court or as a Stipendiary Magistrate to be the authority to hear and decide for any specified area all claims arising out of deductions from wages or out of delay in payment of the wages of any worker in the area.

Where any deduction has been made from the wages of a worker, or where any payment of wages has been delayed, contrary to the provisions of the Act, the worker affected or aggrieved, or any legal practitioner or any official of a registered trade union authorised in writing to act on behalf of the worker, or any Inspector under the Act, or any person acting with the permission of the authority appointed to decide the case or the matter, may apply to the authority for the necessary relief and order. Such application must be presented within six months from the date on which the deduction was made or a payment of wages delayed. An application, however, may be made and may be admitted even after the lapse of six months, if the applicant can satisfy the trying authority that he had good cause for not making the application within the prescribed period of six months.

When such application is entertained, the authority hearing the case or the matter must hear the applicant and the employer or other person responsible for the payment of wages, and must give them an opportunity to be heard, and after the necessary inquiry, such authority may order the refund to the worker of the amount wrongfully deducted, or the payment of the delayed wages, with a payment of such compensation as the authority may think fit not exceeding ten times the amount deducted in the former case and not exceeding ten rupees in the latter. No deduction for the payment of compensation can be made in the case of delayed wages if the authority is satisfied that the delay was due to a bona fide error or bona fide dispute as to the amount payable to the worker or was due to the occurrence of an emergency or an existence of exceptional circumstances, or was due to the failure of the worker himself to apply for or accept payment.

If the authority trying the dispute, after hearing any application, is satisfied that the application was malicious or vexatious, he may direct that a penalty, not exceeding fifty rupees, be imposed on the worker and that the same be paid to the employer or the person responsible for the payment of the wages.

**Appeals Against the Decision of the Trying Authority (Section 17)**

An appeal against any order made by a trying authority under section 16, may, under section 17, be made within thirty days from the date on which such order was made. In a Presidency town the appeal has got to be made before the Court of Small Causes, and elsewhere before the District Court. The employer or other person responsible for the payment of wages may appeal if the total amount ordered to be paid as wages and compensation exceeds three hundred rupees. The worker may appeal, if the total amount of wages claimed to have been withheld from him or from the unpaid group to which he belonged (in the case of a representative application) exceeds fifty rupees. Any person directed to pay a penalty under section 15, may, under section 17, appeal.

**Bar of Suit (Section 22)**

No Court can entertain any suit for the recovery of wages or regarding deduction of any wages if the sum so claimed forms the subject of an application, under section 15 of the Act, which has been presented by the plaintiff and which is pending before the authority under section 15, or where an appeal has been made under section 17. So also such a suit is barred if it has formed the subject of an order under section 15 in favour of the plaintiff or has been adjudged not to be owed to the plaintiff, or if the subject matter could have been recovered by an application under section 15.

**Agreement Relinquishing a Worker's Right Void (Section 23)**

Any agreement whereby a worker relinquishes any right conferred on him by the Payment of Wages Act, shall be regarded as null and void to the extent to which it attempts to deprive a worker of such right.



**CHAPTER XXXVI**  
**WORKMEN'S COMPENSATION**  
**[WORKMEN'S COMPENSATION ACT, 1923]**

**Object of the Act**

The Workmen's Compensation Act is an important and valuable piece of labour legislation. It helps unfortunate workers employed in factories and other places where in the course of their occupation some danger or other may be involved to their life or limb. By casting absolute liability on the employer, the legislature has very wisely protected the worker whose lot otherwise is miserable or whose dependants otherwise would suffer heavily. The Act provides that an employer shall be held liable to compensate the worker for disablement, or in the case of his death his dependants, if the disablement or death occurred as the result of an accident to the worker while in the course of the employment at the establishment of his employer. The liability of the employer is an absolute liability, i.e., he is responsible even though there was no fault, default or negligence on his or his agent's part.

**Definitions and Explanations**

**Minor**

A 'minor' is a person who is under the age of 15 years.

**Adult**

An 'Adult' is a person who has completed 15 years of age.

**Commissioner**

A 'Commissioner' means a Commissioner for Workmen's Compensation appointed under section 20 of the Workmen's Compensation Act.

**Dependant**

A 'dependant' includes a widow of the deceased worker, a minor legitimate son, an unmarried legitimate daughter, and a widowed mother.

Even a widower, a parent other than a widowed mother, a minor illegitimate son, an unmarried illegitimate daughter, a daughter legitimate or illegitimate if married and a minor or if widowed, a minor brother, an unmarried or widowed sister, a widowed daughter-in-law, a minor child of a deceased son, a minor child of a deceased daughter where no parent of the child is alive, or, where no parent of the workman is alive, a paternal grand parent, is included in the definition of a 'dependant', if such person could be regarded as wholly or partly dependent on the earnings of the workman at the time of his death.

**Employer**

An 'employer' includes any body of persons, whether a corporation or not, and any managing agent of an employer and the legal representative of a deceased employer; and when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the term 'employer' includes such other person while the workman is working for him.

**Managing Agent**

A 'managing agent' is any person appointed or acting as the representative of another person for carrying on such other person's trade or business. An individual manager subordinate to an employer is not a managing agent.

### Partial Disablement

'Partial disablement' is such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident which resulted in his disablement, if the disablement is of a temporary nature. Where the disablement is of a permanent character, 'partial disablement' means what reduces the earning capacity of a workman in every employment which he was capable of undertaking at the time of the accident which disabled him.

### Seamen

'Seamen' includes any person forming part of the crew of any ship, but does not include the Master of the ship.

### Total Disablement

'Total disablement' means such disablement, whether permanent or temporary, as renders the worker incapable for all work which he was otherwise capable of doing prior to and at the time of the accident which disabled him. Where the worker loses permanently the sight of both his eyes, the disablement is called permanent total disablement. Where there is a combination of injuries specified in Schedule I of the Act, so that the aggregate percentage of the loss of earning capacity amounts to one hundred per cent., the disablement is said to be permanent total disablement.

### Workman

'Workman' means any person, other than a person whose employment is of a casual nature and who is employed otherwise than for the employer's trade or business, who is a railway servant (not permanently employed in any administrative, district or sub-divisional office of a railway) or who is any worker employed on monthly wages not exceeding four hundred rupees, in any capacity specified in Schedule II of the Act.

### Workmen's Compensation (Section 3)

Where any workman receives any personal injury by an accident arising out of and in the course of his employment, his employer shall be liable to make compensation, provided the injury results in the total or partial disablement of the worker for a period exceeding seven days. The employer is not liable if the injury (not resulting in death) has been caused by an accident which is directly attributable to the workman having been at the time of the accident under the influence of drink or drugs or if the injury (not resulting in death) was caused by an accident directly attributable to the wilful disobedience of the workman of an order expressly given or to a rule expressly framed for the purpose of securing the safety of the workmen or due to the wilful removal or disregard by the workman of any safety measure which he knew to have been provided for the purpose of securing the safety of the workmen. Where the injury, however, results in death of the workman, compensation has got to be made by the employer to the dependants of the workman, even though the injury was due to the fault of the workman himself.

If a workman employed in any employment specified in Part A of Schedule III contracts any disease specified in that schedule as an occupational disease peculiar to that employment, (e.g., anthrax, poisoning by lead, tetra-ethyl, poisoning by nitrous fumes, compressed air illness), or if a workman, whilst in the service of an employer where he has been for a continuous period of at least six months and the employment is of a type specified in Part B of Schedule III, contracts any disease specified in that schedule as an occupational disease peculiar to that employment, e.g., lead-poisoning, phosphorous-poisoning, mercury-poisoning, poisoning by benzene, chrome-ulceration), the contracting of such disease shall be deemed to be an injury by accident; and unless the employer proves the contrary, the accident shall be deemed to have arisen out of and in the course of the employment.

The amount of the compensation is governed by the provisions of section 4 of the Workmen's Compensation Act. [Please see section 4 of the Workmen's Compensation Act, 1923.]

Where there is a total disablement, compensation has to be made by the employer as per the provisions of Schedule IV of the Act. Schedule IV is as follows:—

Monthly wages of the work- man injured.		Amount of Compensation for :—		Half-monthly payment as Compensation for temporary Disablement of Adult.
		Death of Adult.	Permanent total Disable- ment of Adult.	
1		2	3	4
More than. Rs.	But not more than. Rs.	Rs.	Rs.	Rs. As.
0	10	500	700	Half his monthly wages.
10	15	550	770	5 0
15	18	600	840	6 0
18	21	630	882	7 0
21	24	720	1,008	8 0
24	27	810	1,134	8 8
27	30	900	1,260	9 0
30	35	1,050	1,470	9 8
35	40	1,200	1,680	10 0
40	45	1,350	1,890	11 4
45	50	1,500	2,100	12 8
50	60	1,800	2,520	15 0
60	70	2,100	2,940	17 8
70	80	2,400	3,360	20 0
80	100	3,000	4,200	25 0
100	200	3,500	4,900	30 0
200	300	4,000	5,600	30 0
300	....	4,500	6,300	30 0

Where the disablement is a partial disablement, the employer has to make Compensation as provided by Schedule I to the Act. Schedule I is as follows:—

Injury	Percentage of loss of earning capacity.
Loss of right arm above or at elbow	70
Loss of left arm above or at elbow	60
Loss of right arm below elbow	60
Loss of leg at or above the knee	60
Loss of left arm below the elbow	50
Loss of left leg below the knee	50
Permanent total loss of hearing	50
Loss of one eye	30
Loss of thumb	25
Loss of all toes of one foot	20
Loss of one phalanx of thumb	10
Loss of index finger	10
Loss of great toe	10
Loss of any finger other than index finger	5

Complete and permanent loss of the use of any limb or member referred to in the above Schedule I means the loss of that limb or member.

### **Compensation not Assignable, Attachable or Chargeable (Section 9)**

Except as otherwise provided under the Workmen's Compensation Act, no lump sum or half-monthly payment payable as compensation to any workman can in any way be assigned or charged or attached or passed to any person other than the workman by operation of law; nor shall any claim be set off against such compensation.

### **Notice and Claim (Section 10)**

A claim for compensation must not be entertained by a Commissioner unless notice of the accident has been given as soon as practicable after the occurrence and unless the claim is brought before the Commissioner within one year from the date of the occurrence of the accident, or, in case of death, within one year from the date of the death. The notice which has to be given must give the name and the address of the person injured and must state in ordinary language the cause of the injury and the date on which the accident happened, and must be served on the employer or upon any one of several employers or upon any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed.

### **Power to Require from Employers Statements Regarding Fatal Accidents (Section 10A)**

When a Commissioner receives any information from any person or from any source that a workman has died as a result of an accident arising out of and in the course of his employment, he may send by registered post a notice to the workman's employer requiring him to submit, within thirty days of the service of the notice a statement in the prescribed form, giving the circumstances attending the death of the workman and stating whether, in the opinion of the employer, he is or he is not liable to deposit compensation on account of the death. If the employer is of the opinion that he is liable to deposit compensation, he must make the deposit within thirty days of the service of the notice. If the employer is of the opinion that he is not so liable, he must in his statement show the grounds on which he disclaims liability.

Where an employer has disclaimed liability, the Commissioner may inform any of the dependants of the deceased workman that such dependants may prefer a claim for compensation.

### **Reports of Fatal Accidents (Section 10B)**

Where, by the law, an employer is bound to give notice to any authority about an accident occurring on his premises and resulting in death of a workman, the person so required to give the notice must, within seven days of the death, send a report to the Commissioner stating the circumstances under which the death occurred.

### **Medical Examination (Section 11)**

Where a workman has given notice of an accident, he must submit himself to a medical examination, if the employer, before the expiration of three days from the time the notice is served, offers to have the employee examined free of charge by a qualified medical practitioner. Any workman who is in receipt of a half-monthly payment must, if so required, submit himself for such examination from time to time. If a workman refuses to so submit himself, or obstructs the medical examination, his right to compensation shall be suspended during the continuance of such refusal or obstruction unless, in the case of refusal, he was prevented by sufficient cause from so submitting himself. Where a workman, whose right to compensation has been suspended, dies without having submitted himself for medical examination, the Commissioner may, if he thinks fit, order the payment of compensation to the dependants of the deceased workman.

### **Remedies of Employer Against Third Parties (Section 13)**

Where a third party (an outsider) is responsible for any damage caused to an employee and where the employee has recovered from the employer compensation in respect of the injury, the employer can claim indemnity from the person, that is the third party (outsider) who had caused the damage.

### **Insolvency of Employer (Section 14)**

Where the employer has become an insolvent, or (if a company) is in the course of a winding-up, and the employer had effected an insurance in respect of his liability by way of compensation under the Act to his workmen, the insurer shall be liable to indemnify the workmen but not so as to be under any greater liability to the workmen than it (the insurer) would have been to the employer. For any balance or deficiency, the workman can rank and prove against the official assignee or the receiver, as the case may be, in the insolvency of an employer, or against the liquidator if the employer be a company in liquidation.

### **Special Provisions Relating to Masters and Seamen (Section 15)**

The provisions of the Workmen's Compensation Act are, under section 15, applicable to seamen, subject to the following modifications :—

- (1) The notice of the accident and the claim for compensation may, except where the person injured is the master of the ship, be served on the master of the ship, as if he were the employer ; but where the accident happened and the disablement commenced on board the ship, it shall not be necessary for any seaman to give any notice of the accident.
- (2) In the case of death of a master or seaman the claim for compensation must be made within six months after the news of the death has been received by the claimant, or where the ship has been or deemed to have been lost with all hands, then within eighteen months from the date on which the ship was, or is deemed to have been, so lost.
- (3) Where an injured master or seaman is discharged or left behind, any depositions taken by any judge or magistrate in that part or by any consular officer in the foreign country and transmitted by the person by whom they are taken to the Central Government or any State Government shall, in any proceedings for enforcing the claims, be admissible in evidence, if the deposition is authenticated by the signature of the judge, magistrate or consular officer before whom it was made, and if the defendant or accused had an opportunity to cross-examine the witness, and if the deposition was made in the course of a criminal proceeding in the presence of the accused.
- (4) No half-monthly payment shall be payable in respect of the period during which the owner of the ship is under any law relating to Merchant Shipping, liable to defray the expenses of maintenance of the injured master or seaman.
- (5) No compensation shall be payable in respect of any injury regarding which provision is made for payment of a gratuity, allowance or pension under the War Pension and Detention Allowance (Mercantile Marine, etc.) Scheme, 1939, or the War Pensions and Detention Allowances (Indian Seamen) Scheme, 1941, made under the Pensions (Navy, Army or Air Force and Mercantile Marine) Act, 1939.
- (6) Failure to give a notice or make a claim or commence proceedings within the time required by the Act shall not be a bar to the maintenance of proceedings under the Act in respect of any personal injury, if an application has been made for payment in respect of that injury under any of the schemes referred to already, and the State Government certifies that the application was made

with reasonable belief that the injury was one in respect of which the scheme under which the application was made makes provision for payments, and that the application was rejected or that payments made in pursuance of the application were discontinued on the ground that the injury was not such an injury, and the proceedings had commenced within one month from the date on which the certificate of the State Government was furnished to the person commencing the proceedings.

### **Returns as to Compensation (Section 16)**

The State Government may require that every employer shall send at such time and in such form and to such authority as may be specified by the Government, a correct return specifying the number of the injuries in respect of which compensation has been made by the employer during the previous year, and the amount of such compensation, with such other particulars as the Government may require.

### **Agreement relinquishing a Right is void (Sec. 17)**

Any agreement whereby a workman gives up his right to compensation by the master for personal injury arising in the course of the employment, shall be regarded as null and void in so far as it attempts to reduce or take away the liability to compensate.

### **Reference to Commissioners (Section 19)**

Where a question arises as to the liability of any person to pay compensation, the question must be settled by a Commissioner, in default of agreement; so also any question as to whether a person injured is or is not a workman or any question as to the amount or duration of compensation (including any question as to the nature or extent of disablement), shall, in default of agreement, be settled by a Commissioner. No Civil Court shall have jurisdiction to settle, decide or deal with any question which is, under the Act, required to be settled, decided or dealt with by a Commissioner. So also no Civil Court can enforce any liability incurred under the Act.

### **Appointment of Commissioners (Section 20)**

The State Government may, by notification in the Official Gazette, appoint any person to be a Commissioner for Workmen's Compensation for such local area as may be specified in the notification.

### **Venue of Proceedings and Transfer (Section 21)**

Where any matter has, under the Act, to be done by or before a Commissioner, the same shall be done by or before a Commissioner for the local area in which the accident took place. Where the workman is the master of a ship or a seaman any such matter can be done by or before the Commissioner for the local area in which the owner or agent of the ship resides or carries on business. If a Commissioner of a local area is satisfied that any matter before him can be more conveniently dealt with by some other Commissioner, whether in the same State or not, he may order such matter to be transferred to such other Commissioner for report or for disposal, and if he does so, he must forthwith transmit to such other Commissioner all documents relevant for the decision of the matter, and must also transmit any money in his hands or invested by him for the benefit of any party to the proceedings.

### **Powers of Commissioners**

A Commissioner, appointed under the Act, shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence on oath and of enforcing the attention of witnesses and compelling the production of documents and material objects. [Sec. 23]. A Commissioner is considered a Civil Court; but a Commissioner does not possess the power of review. A revision application can be made to the High Court against an order passed by him (the Commissioner). A Commissioner has no power to have evidence taken on commission.

The Commissioner must make a brief memorandum of the substance of the evidence of every witness ; such memorandum shall be written and signed by the Commissioner and shall form part of the record of the case. Where the Commissioner is prevented from making the memorandum in his own handwriting, he must cause such memorandum to be made in writing from his dictation and must sign the same and such memorandum shall then form part of the record. The evidence of any medical witness must be taken down "as nearly as may be word for word". (Sec. 2.5)

Where any sum deposited by an employer as compensation payable in respect of a workman whose injury has resulted in death, is in the opinion of the Commissioner insufficient, the Commissioner may, by a notice in writing, stating his reasons, call upon the employer to show cause why he should not make a further deposit within such time as may be stated in the notice (Sec. 22 A).

The Commissioner may, if he thinks fit, submit any question of law for the decision of the High Court. If he does so he is bound to decide the question according to the High Court's decision. (Sec. 27).

### Appeals

An appeal lies to the High Court from the following orders of a Commissioner, viz. :—

- (1) An order awarding a lump sum compensation or an order disallowing a claim in full or in part for a lump sum ;
- (2) An order refusing to allow redemption of a half-monthly payment ;
- (3) An order providing for distribution of compensation among the dependants of a deceased workman or disallowing any claim of a person alleging himself to be such dependant ;
- (4) an order allowing or disallowing any claim for an indemnity under sub-section (2) of section 12 of the Act ; or
- (5) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same.

An appeal can be brought within sixty days from the date of the Commissioner's order.

### Registration of Agreements of Settlement (Sections 28 and 29)

Where the amount of any lump sum payable as compensation has been settled by agreement, or where any compensation has been settled by agreement as being payable to a woman or a person under a legal disability, a memorandum thereof must be sent by the employer to the Commissioner who must, on being satisfied as to its genuineness, record the memorandum in a register in the prescribed manner. (Sec. 28).

Where a memorandum of any agreement the registration of which is required, as above-stated, is not sent to the Commissioner as required, the employer shall be liable to pay the full amount of compensation which he is liable to pay under the Act, and he shall not, unless the Commissioner otherwise directs, be entitled to deduct more than half of any amount paid to the workman by way of compensation whether under the agreement or otherwise. (Sec. 29).

**APPENDIX**  
**TEXTS OF ACTS**  
**THE**  
**INDIAN CONTRACT ACT**  
**(IX of 1872)**

**Preamble :** Whereas it is expedient to define and amend certain parts of the law relating to contracts; it is hereby enacted as follows:—

**PRELIMINARY**

**1. Short Title :** This Act may be called the Indian Contract Act, 1872.

**Extent, commencement :** It extends to the whole of India except the State of Jammu and Kashmir and it came into force on the first day of September, 1872.

**Enactments repealed :** Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

**2. Interpretation clause :** In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal ;

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise ;

(c) The person making the proposal is called the “promisor”, and the person accepting the proposal is called the “promisee” ;

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise ;

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement ;

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises ;

(g) An agreement not enforceable by law is said to be void ;

(h) An agreement enforceable by law is a contract ;

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract ;

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.



## CHAPTER I

### OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS

**3. Communication, acceptance and revocation of proposals:** The Communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

**4. Communication when complete :** The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor ;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

#### ILLUSTRATIONS

(a) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete,—

as against A, when the letter is posted ;

as against B, when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

**5. Revocation of proposals and acceptances:** A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

#### ILLUSTRATIONS

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

**6. Revocation how made:** A proposal is revoked—

- (1) by the communication of notice of revocation by the proposer to the other party ;
- (2) by the lapse of the time prescribed in such proposal for its acceptance or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance ;
- (3) by the failure of the acceptor to fulfil a condition precedent to acceptance ; or
- (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

**7. Acceptance must be absolute:** In order to convert a proposal into a promise, the acceptance must—

- (1) be absolute and unqualified ;
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise ; but if he fails to do so, he accepts the acceptance.

**8. Acceptance by performing conditions, or receiving consideration :** Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

**9. Promises, express and implied :** In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

## CHAPTER III

### OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

**10. What agreements are contracts :** All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in Indian Union and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

**11. Who are competent to contract:** Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

**12. What is a sound mind for the purposes of contracting:** A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

#### ILLUSTRATIONS

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests cannot contract whilst such delirium or drunkenness lasts.

**13. "Consent" defined :** Two or more persons are said to consent when they agree upon the same thing in the same sense.

**14. "Free consent" defined :** Consent is said to be free when it is not caused by—

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

**15. "Coercion" defined:** "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

**EXPLANATION.**—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

#### ILLUSTRATION

A on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England and although section 506 of the Indian Penal Code, was not in force at the time when or place where the act was done.

**16. "Undue influence" defined:** (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872.

ILLUSTRATION

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

**17. "Fraud" defined:** "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

(1) the suggestion as to a fact, of that which is not true by one who does not believe it to be true ;

(2) the active concealment of a fact by one having knowledge or belief of the fact ;

(3) a promise made without any intention of performing it ;

(4) any other act fitted to deceive ;

(5) any such act or omission as the law specially declares to be fraudulent.

**EXPLANATION.**—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak or unless his silence is, in itself, equivalent to speech.

ILLUSTRATIONS

(a) A sells by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A—"If you do not deny it, I shall assume that the horse is sound". A says nothing. Here, A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

**18. "Misrepresentation" defined:** "Misrepresentation" means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true ;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him ;
- (3) causing however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

**19. Voidability of agreements without free consent:** When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

**EXCEPTION.**—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

**EXPLANATION.**—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

**ILLUSTRATIONS**

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B. B dies ; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

**19A. Power to set aside contract induced by undue influence:** When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

#### ILLUSTRATIONS

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.

**20. Agreement void where both parties are under mistake as to a matter of fact:** Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

**EXPLANATION.**—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

#### ILLUSTRATIONS

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

**21. Effect of mistakes as to law:** A contract is not voidable because it was caused by a mistake as to any law in force in Indian Union; but a mistake as to a law not in force in Indian Union has the same effect as a mistake of fact.

#### ILLUSTRATION

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

**22. Contract caused by mistake of one party as to matter of fact.**—A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

**X 23. What considerations and objects are lawful and what not:** The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent ; or  
involves or implies injury to the person or property of another ; or  
the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

#### ILLUSTRATIONS

(a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d) A promises to maintain B's child and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's mukhtyar, promises to exercise his influence, as such with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

VOID AGREEMENTS

**24. Agreements void, if considerations and objects unlawful in part:** If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful the agreement is void.

ILLUSTRATION

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

**25. Agreement without consideration void unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt, barred by limitation law:** An agreement made without consideration is void unless—

(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other, or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

**EXPLANATION 1.**—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

**EXPLANATION 2.** An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate ; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

ILLUSTRATIONS

(a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that this consent to the agreement was freely given.



## INDIAN CONTRACT ACT

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

**26. Agreement in restraint of marriage void:** Every agreement in restraint of the marriage of any person other than a minor, is void.

**27. Agreement in restraint of trade void:** Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

**EXCEPTION 1.—SAVING OF AGREEMENT NOT TO CARRY ON BUSINESS OF WHICH GOODWILL IS SOLD.**—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein : Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

**28. Agreements in restraint of legal proceedings void:** Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

**EXCEPTION 1.—SAVINGS OF CONTRACT TO REFER TO ARBITRATION DISPUTE THAT MAY ARISE.**—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

**EXCEPTION 2.—SAVING OF CONTRACT TO REFER QUESTIONS THAT HAVE ALREADY ARISEN.**—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

**29. Agreements void for uncertainty:** Agreements, the meaning of which is not certain, or capable of being made certain, are void.

### ILLUSTRATIONS

(a) A agrees to sell to B "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in cocoanut oil only, agrees to sell to B "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of cocoanut oil.

(d) A agrees to sell to B "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A agrees to sell B "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

**30. Agreements by way of wager void:** Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide by the result of any game or other uncertain event on which a wager is made.

**EXCEPTION IN FAVOUR OF CERTAIN PRIZES FOR HORSE RACING.**—This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or towards any plate, prize or sum or money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

**SECTION 294-A OF THE INDIAN PENAL CODE NOT AFFECTED.**—Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code, apply.

### CHAPTER III

#### OF CONTINGENT CONTRACTS

**31. "Contingent contract" defined:** A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

##### ILLUSTRATION

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

**32. Enforcement of contracts contingent on an event happening:** Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

##### ILLUSTRATIONS

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy it. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

**33. Enforcement of contracts contingent on an event not happening:** Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

##### ILLUSTRATION

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

**34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person:** If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

#### ILLUSTRATION

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible although it is possible that D may die and that C may afterwards marry B.

**35. When contracts become void which are contingent on happening of specified event within fixed time:** Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

WHEN CONTRACTS MAY BE ENFORCED WHICH ARE CONTINGENT ON SPECIFIED EVENT NOT HAPPENING WITHIN FIXED TIME.—Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

#### ILLUSTRATIONS

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

**36. Agreements contingent on impossible events void:** Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

#### ILLUSTRATIONS

(a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

### CHAPTER IV

#### OF THE PERFORMANCE OF CONTRACTS

##### CONTRACTS WHICH MUST BE PERFORMED

**37. Obligation of parties to contracts:** The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

ILLUSTRATIONS

(a) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before that day. The contract cannot be enforced either by A's representatives or by B.

✱ 38. **Effect of refusal to accept offer of performance:** Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions :—

(1) it must be unconditional ;

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do ;

(3) if the offer is an offer to deliver anything to the promisee the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

ILLUSTRATION

A contracts to deliver to B at his warehouse, on the first March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for and that there are 100 bales.

✱ 39. **Effect of refusal of party to perform promise wholly:** When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.

ILLUSTRATIONS

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absent herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified

his acquiescence in the continuance of the contract and cannot now put an end to it but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

#### BY WHOM CONTRACTS MUST BE PERFORMED

**40. Person by whom promise is to be performed:** If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

#### ILLUSTRATIONS

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

**41. Effect of accepting performance from third person:** When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

**42. Devolution of joint liabilities:** When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor, or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

**43. Any one of joint promisors may be compelled to perform:** When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

**EACH PROMISOR MAY COMPEL CONTRIBUTION.**—Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

**SHARING OF LOSS BY DEFAULT IN CONTRIBUTION.**—If any one or two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

**EXPLANATION.**—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

#### ILLUSTRATIONS

(a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

(c) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d) A, B and C are under a joint promise to pay D 3,000 rupees. A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

**44. Effect of release of one joint promisor:** Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors, neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

**45. Devolution of joint rights:** When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

#### ILLUSTRATION

A, in consideration of 5,000 rupees lent to him, by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

#### TIME AND PLACE FOR PERFORMANCE

**46. Time for performance of promise where no application is to be made and no time is specified:** Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

**EXPLANATION.**—The question “what is a reasonable time” is in each particular case, a question of fact.

**47. Time and place for performance of promise, where time is specified and no application to be made:** When a promise is to be performed on a certain day and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

#### ILLUSTRATION

A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

**48. Application for performance on certain day to be at proper time and place:** When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

**EXPLANATION.**—The question “what is a proper time and place” is, in each particular case, a question of fact.

**49. Place for performance of promise where no application to be made and no place fixed for performance:** When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

#### ILLUSTRATION

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

**Performance in manner or at time prescribed or sanctioned by promisee—**  
The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

#### ILLUSTRATIONS

(a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit; and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B respectively, of the sums which they owed to each other.

(c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

#### PERFORMANCE OF RECIPROCAL PROMISES

**51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform:** When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

#### ILLUSTRATIONS

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

**52. Order of performance of reciprocal promises:** Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order ; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

## ILLUSTRATIONS

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

**53. Liability of party preventing event on which contract is to take effect:** When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented ; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

## ILLUSTRATION

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B ; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

**54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises:** When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

## ILLUSTRATIONS

(a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.



(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed and A must make compensation.

**55. Effect of failure to perform at fixed time in contract in which time essential:** When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

**EFFECT OF SUCH FAILURE WHEN TIME IS NOT ESSENTIAL :** If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time ; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

**EFFECT OF ACCEPTANCE OF PERFORMANCE AT TIME OTHER THAN THAT AGREED UPON.**—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

**56. Agreement to do impossible act:** An agreement to do an act impossible in itself is void.

**CONTRACT TO DO ACT AFTERWARDS BECOMING IMPOSSIBLE OR UNLAWFUL :** A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

**COMPENSATION FOR LOSS THROUGH NON-PERFORMANCE OF ACT KNOWN TO BE IMPOSSIBLE OR UNLAWFUL :** Where one person has promised to do something which he knew or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

#### ILLUSTRATIONS

- (a) A agrees with B to discover treasure by magic. The agreement is void.
- (b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- (c) A contracts to marry B being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.
- (d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- (e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

**57. Reciprocal promises to do things legal and also other things illegal.**—Where persons reciprocally promise, firstly, to do certain things which are legal and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

ILLUSTRATION

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

**58. Alternative promise one branch being illegal.**—In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

ILLUSTRATION

A and B agree that A shall pay B 1,000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice and void agreement as to the opium.

APPROPRIATION OF PAYMENTS

**59. Application of payment where debt to be discharged is indicated:** Where a debtor owing several distinct debts to one person, makes a payment to him either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

ILLUSTRATIONS

(a) A owes B, among other debts, 1,000 rupees upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

**60. Application of payment where debt to be discharged is not indicated:** Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

**61. Application of payment where neither party appropriates :** Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

## CONTRACTS WHICH NEED NOT BE PERFORMED

**62. Effect of novation, rescission and alteration of contract:** If the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed.

## ILLUSTRATIONS

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

**63. Promisee may dispense with or remit performance of promise:** Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

## ILLUSTRATIONS

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A without ascertaining the amount gives to B, and B, in satisfaction thereof, accepts the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B to pay them a composition of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

**64. Consequences of rescission of voidable contract:** When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

**65. Obligation of person who has received advantage under void agreement or contract that becomes void:** When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

ILLUSTRATIONS

(a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

**66. Mode of communicating or revoking rescission of voidable contract:** The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

**67. Effect of neglect of promisee to afford promisor reasonable facilities for performance:** If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

ILLUSTRATION

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

CHAPTER V.

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED  
BY CONTRACT

**68. Claims for necessities supplied to person incapable of contracting or on his account :** If a person incapable of entering into a contract, or any one whom he is legally bound to support is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

ILLUSTRATIONS

(a) A supplies B, a lunatic, with necessities suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessities suitable to their condition in life. A is entitled to be reimbursed from B's property.

**69. Reimbursement of person paying money due by another in payment of which he is interested.**—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

#### ILLUSTRATIONS

B holds land in Bengal, on a lease granted by A, the zamindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

**70. Obligation of person enjoying benefit of non-gratuitous act :** Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

#### ILLUSTRATIONS

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that he intended to act gratuitously.

**71. Responsibility of finder of goods.**—A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.

**72. Liability of person to whom money is paid, or thing delivered by mistake or under coercion :** A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

#### ILLUSTRATIONS

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

### CHAPTER VI

#### OF THE CONSEQUENCES OF BREACH OF CONTRACT

**73. Compensation for loss or damage caused by breach of contract :** When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

**COMPENSATION FOR FAILURE TO DISCHARGE OBLIGATION RESEMBLING THOSE CREATED BY CONTRACT.**—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

**EXPLANATION.**—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

#### ILLUSTRATIONS

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) A hires B's ship to go to Bombay, and there take on board, on the 1st of January, a cargo, which A is to provide and to bring to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some unavoidable cause does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freight rises, and on the first of January the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and, in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who in consequence loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of re-building the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and B, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

**74. Compensation for breach of contract where penalty stipulated for:** When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

**EXPLANATION.**—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

**EXCEPTION.**—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the order of the Central Government or of any State Government gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

**EXPLANATION.**—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

#### ILLUSTRATIONS

(a) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) A contracts with B that if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.



(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

**75. Party rightfully rescinding contract entitled to compensation:** A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

#### ILLUSTRATION

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

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*Chapter VII—Sections 76-123. Sale of Goods.*  
*Repealed by Act III of 1930.*

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### CHAPTER VIII

#### OF INDEMNITY AND GUARANTEE

**124. "Contract of indemnity" defined:** A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

#### ILLUSTRATION

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

**125. Rights of indemnity-holder when sued:** The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit ;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

**126. "Contract of guarantee", "surety", "principal debtor" and "creditor":**

A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

**127. Consideration for guarantee:** Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

ILLUSTRATIONS

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

**128. Surety's liability:** The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

ILLUSTRATION

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

**129. Continuing guarantee:** A guarantee which extends to a series of transactions is called a "continuing guarantee".

ILLUSTRATIONS

(a) A in consideration that B will employ C in collecting the rents of B's zamindari promises B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to C. B supplies C with tea to above the value of

£100, and C pays B for it. Afterwards B supplies C with tea to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

**130. Revocation of continuing guarantee:** A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

#### ILLUSTRATIONS

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees on default of C.

(b) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

**131. Revocation of continuing guarantee by surety's death:** The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

**132. Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default:** Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

#### ILLUSTRATION

A and B made a joint and several promissory note to C. A makes it, in fact, as surety for B and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

**133. Discharge of surety by variance in terms of contract:** Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

#### ILLUSTRATIONS.

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer

to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after his new agreement.

(e) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied inasmuch as C might sue B for the money before the 1st of March.

**134. Discharge of surety by release or discharge of principal debtor:** The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

#### ILLUSTRATIONS

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

**135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor:** A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

**136. Surety not discharged when agreement made with third person to give time to principal debtor:** Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

## ILLUSTRATION

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

**137. Creditor's forbearance to sue does not discharge surety:** Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

## ILLUSTRATION

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

**138. Release of one co-surety does not discharge others:** Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

**139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy:** If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

## ILLUSTRATIONS

(a) B contracts to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C without the knowledge of A, prepays to B the last two instalments. A is discharged by this prepayment.

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.

(c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

**140. Rights of surety on payment or performance:** Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

**141. Surety's right to benefit of creditor's securities:** A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

ILLUSTRATIONS

(a) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

**142. Guarantee obtained by misrepresentation invalid:** Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

**143. Guarantee obtained by concealment invalid:** Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

ILLUSTRATIONS

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

**144. Guarantee on contract that creditor shall not act on it until co-surety joins:** Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

**145. Implied promise to indemnify surety:** In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

ILLUSTRATIONS

(a) B is indebted to C, and A is surety for the debt. C demands payment from A and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

**146. Co-sureties liable to contribute equally:** Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary, are liable as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

#### ILLUSTRATIONS

(a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

(b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

**147. Liability of co-sureties bound in different sums:** Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

#### ILLUSTRATIONS

(a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are each liable to pay 10,000 rupees.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

(c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay each the full penalty of his bond.

### CHAPTER IX

#### OF BAILMENT

**148. "Bailment", "bailor" and "bailee" defined:** A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the direction of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee."

**EXPLANATION.**—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

**149. Delivery to bailee how made:** The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

**150. Bailor's duty to disclose faults in goods bailed:** The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks, and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

#### ILLUSTRATIONS

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

**151. Care to be taken by bailee:** In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

**152. Bailee when not liable for loss, etc., of thing bailed:** The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

**153. Termination of bailment by bailee's act inconsistent with conditions:** A contract of bailment is avoidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

#### ILLUSTRATION

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

**154. Liability of bailee making unauthorized use of goods bailed:** If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

#### ILLUSTRATIONS

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.



(b) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

**155. Effect of mixture, with bailor's consent of his goods with bailee's:** If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

**156. Effect of mixture without bailor's consent, when the goods can be separated:**—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

#### ILLUSTRATION

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark: A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

**157. Effect of mixture without bailor's consent, when the goods cannot be separated:** If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

#### ILLUSTRATION

A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.

**158. Repayment by bailor of necessary expenses:** Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor and the bailee is to receive no remuneration the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

**159. Restoration of goods lent gratuitously:** The lender of a thing for use may at any time require its return, if the loan was gratuitous even though he lent it for a specified time or purpose. But, if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

**160. Return of goods bailed on expiration of time or accomplishment of purpose:** It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

**161. Bailee's responsibility when goods are not duly returned:** If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper

time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

**162. Termination of gratuitous bailment by death.**—A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

**163. Bailor entitled to increase or profit from goods bailed:** In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

#### ILLUSTRATION

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

**164. Bailor's responsibility to bailee:** The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions respecting them.

**165. Bailment by several joint owners:** If several joint owners of goods bail them the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

**166. Bailee not responsible on re-delivery to bailor without title:** If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

**167. Right of third person claiming goods bailed:** If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods bailed, and to decide the title to the goods.

**168. Right of finder of goods ; may sue for specific reward offered.**—The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner ; but he may retain the goods against the owner until he receives such compensation ; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

**169. When finder of thing commonly on sale may sell it.**—When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value, or

(2) when the lawful charges of the finder in respect of the thing found amount to two-thirds of its value.

**170. Bailee's particular lien:** Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

## ILLUSTRATIONS

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat until he is paid.

**171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers:** Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them ; but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

## BAILMENTS OF PLEDGES

**172. "Pledge", "pawnor" and "pawnee" defined:** The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

**173. Pawnee's right of retainer.**—The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

**174. Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances:** The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged ; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

**175. Pawnee's right as to extraordinary expenses incurred:** The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

**176. Pawnee's right where pawnor makes default:** If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security ; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

**177. Defaulting pawnor's right to redeem:** If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them ; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

**178. Pledge by mercantile agent.** Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

**EXPLANATION.**—In this section, the expressions ‘mercantile agent’ and ‘documents of title’ shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.

**178A. Pledge by person in possession under voidable contract:** When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor’s defect of title.

**179. Pledge where pawnor has only a limited interest:** Where a person pledges goods in which he has only a limited interest the pledge is valid to the extent of that interest.

#### SUITS BY BAILEES OR BAILORS AGAINST WRONG-DOERS

**180. Suit by bailor or bailee against wrong-doer:** If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made ; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

**181. Apportionment of relief or compensation obtained by such suits:** Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

### CHAPTER X.

#### AGENCY

##### APPOINTMENT AND AUTHORITY OF AGENTS

**182. “Agent” and “principal” defined:** An “agent” is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the “principal”.

**183. Who may employ agent:** Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

**184. Who may be an agent:** As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

**185. Consideration not necessary:** No consideration is necessary to create an agency.

**186. Agent's authority may be expressed or implied:** The authority of an agent may be expressed or implied.

**187. Definitions of express and implied authority:** An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case, and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

#### ILLUSTRATION

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

**188. Extent of agent's authority:** An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

#### ILLUSTRATIONS

(a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same.

(b) A constitutes B his agent to carry on his business of a shipbuilder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

**189. Agent's authority in an emergency:** An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

#### ILLUSTRATIONS

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

#### SUB-AGENTS

**190. When agent cannot delegate:** An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.

**191. "Sub-agent" defined:** A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

**192. Representation of principal by sub-agent properly appointed:** Where a sub-agent is properly appointed the principal is, so far as regards third persons,

represented by the sub-agent, and is bound by and responsible for his acts as if he were an agent originally appointed by the principal.

**Agent's responsibility for sub-agents:** The agent is responsible to the principal for the acts of the sub-agent.

**Sub-agent's responsibility:** The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

**193. Agent's responsibility for sub-agent appointed without authority:** Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons ; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

**194. Relation between principal and person duly appointed by agent to act in business of agency:** Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent but an agent of the principal for such part of the business of the agency as is entrusted to him.

#### ILLUSTRATIONS

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale ; C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent but is solicitor for A.

**195. Agent's duty in naming such person:** In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case ; and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

#### ILLUSTRATIONS

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

#### RATIFICATION

**196. Right of person as to acts done for him without his authority. Effect of ratification:** Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

**197. Ratification may be expressed or implied:** Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

ILLUSTRATIONS

(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.

(b) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

**198. Knowledge requisite for valid ratification:** No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

**199. Effect of ratifying unauthorized act forming part of a transaction:** A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

**200. Ratification of unauthorized act cannot injure third person:** An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

ILLUSTRATIONS

(a) A, not being authorized thereto by B, demands on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

(b) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

REVOCATION OF AUTHORITY

**201. Termination of agency:** An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

**202. Termination of agency where agent has an interest in subject-matter:** Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

ILLUSTRATIONS

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price, the amount of his own advances. A cannot revoke this authority, nor it is terminated by his insanity or death.

**203. When principal may revoke agent's authority:** The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

**204. Revocation where authority has been partly exercised:** The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

## ILLUSTRATIONS

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

**205. Compensation for revocation by principal or renunciation by agent :-** Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

**206. Notice of revocation or renunciation:** Reasonable notice must be given of such revocation or renunciation ; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

**207. Revocation and renunciation may be expressed or implied:** Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

## ILLUSTRATION

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

**208. When termination of agent's authority takes effect as to agent and as to third persons:** The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them.

## ILLUSTRATIONS

(a) A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.

(b) A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.



**209. Agent's duty on termination of agency by principal's death or insanity:**

When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

**210. Termination of sub-agent's authority:** The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

**AGENT'S DUTY TO PRINCIPAL**

**211. Agent's duty in conducting principal's business:** An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

**ILLUSTRATIONS**

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

**212. Skill and diligence required from agent:** An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

**ILLUSTRATIONS.**

(a) A, a merchant in Calcutta, has an agent B, in London to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as *e.g.*, by variation of rate of exchange—but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance-broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d). A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

**213. Agent's accounts:** An agent is bound to render proper accounts to his principal on demand.

**214. Agent's duty to communicate with principal:** It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

**215. Right of principal when agent deals, on his own account in business of agency without principal's consent:** If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all the material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

#### ILLUSTRATIONS

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

**216. Principal's right to benefit gained by agent dealing on his own account in business of agency:** If an agent, without the knowledge of his principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

#### ILLUSTRATIONS

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

**217. Agent's right of retainer out of sums received on principal's account :** An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

**218. Agent's duty to pay sums received for principal:** Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

**219. When agent's remuneration becomes due:** In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act ; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

**220. Agent not entitled to remuneration for business misconducted:** An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

#### ILLUSTRATIONS

(a) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees and he must make good the 2,000 rupees to B.

(b) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

**221. Agent's lien on principal's property:** In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether moveable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

#### PRINCIPAL'S DUTY TO AGENT

**222. Agent to be indemnified against consequences of lawful acts :** The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

#### ILLUSTRATIONS

(a) B, at Singapur, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

(b) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

**223. Agent to be indemnified against consequence of acts done in good faith:** Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

#### ILLUSTRATIONS

(a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B.

The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B, and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

**224. Non-liability of employer of agent to do a criminal act:** Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

#### ILLUSTRATIONS

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

**225. Compensation to agent for injury caused by principal's neglect:** The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

#### ILLUSTRATION

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B.

#### EFFECT OF AGENCY ON CONTRACT WITH THIRD PERSONS

**226. Enforcement and consequences of agent's contracts:** Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

#### ILLUSTRATIONS

(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set-off against that claim a debt due to himself from B.

(b) A, being B's agent with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

**227. Principal how far bound when agent exceeds authority:** When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal.

ILLUSTRATION

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

**228. Principal not bound when excess of agent's authority is not separable :** Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

ILLUSTRATION

A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

**229. Consequences of notice given to agent:** Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

ILLUSTRATIONS

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set-off against the price of the goods a debt owing to him from C.

**230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal:** In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

**Presumption of contract to contrary:** Such a contract shall be presumed to exist in the following cases:—

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad :

(2) where the agent does not disclose the name of this principal ;

(3) where the principal, though disclosed, cannot be sued.

**231. Rights of parties to a contract made by agent not disclosed:** If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract ; but the other contracting party has, as against the principal, the same right as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

**232. Performance of contract with agent supposed to be principal:** Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

#### ILLUSTRATION

A, who owes 500 rupees to B, sells 1,000 rupees worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

**233. Right of person dealing with agent personally liable:** In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable.

#### ILLUSTRATION

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both for the price of the cotton.

**234. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable:** When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

**235. Liability of pretended agent:** A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss of damage which he has incurred by so dealing.

**236. Person falsely contracting as agent not entitled to performance:** A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

**237. Liability of principal inducing belief that agent's unauthorized acts were authorized:** When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such act or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

#### ILLUSTRATIONS

(a) A consigns goods to B for sale and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

**238. Effect on agreement, of misrepresentation or fraud by agent:** Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if

such misrepresentations or frauds had been made or committed by the principals, but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

#### ILLUSTRATIONS

(a) A being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

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# INDIAN SALE OF GOODS ACT

(ACT III of 1930).

Whereas it is expedient to define and amend the law relating to the sale of goods ; It is hereby enacted as follows :—

## CHAPTER I

### PRELIMINARY

**1. Short title, extent and commencement:** (1) This Act may be called the Indian Sale of Goods Act, 1930.

(2) It extends to the whole of India, except the State of Jammu and Kashmir.

(3) It came into force on the first day of July, 1930.

**2. Definitions:** In this Act, unless there is anything repugnant in the subject or context,—

- (1) “buyer” means a person who buys or agrees to buy goods ;
- (2) “delivery” means voluntary transfer of possession from one person to another ;
- (3) goods are said to be in a “deliverable state” when they are in such state that the buyer would under the contract be bound to take delivery of them ;
- (4) “document of title to goods” includes a bill of lading, dock-warrant, warehouse keeper’s certificate, wharfinger’s certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented ;
- (5) “fault” means wrongful act or default ;
- (6) “future goods” means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale ;
- (7) “goods” means every kind of movable property other than actionable claims and money ; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale ;
- (8) a person is said to be “insolvent” who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not ;
- (9) “mercantile agent” means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods ;



## INDIAN SALE OF GOODS ACT

- (10) "price" means the money consideration for a sale of goods ;
- (11) "property" means the general property in goods, and not merely a special property ;
- (12) "quality of goods" includes their state or condition ;
- (13) "seller" means a person who sells or agrees to sell goods ;
- (14) "specific goods" means goods identified and agreed upon at the time a contract of sale is made ; and
- (15) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, have the meanings assigned to them in that Act.

**3. Application of provisions of Act IX of 1872:** The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods.

## CHAPTER II

### FORMATION OF THE CONTRACT

#### Contract of Sale

**4. Sale and agreement to sell;** (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

#### Formalities of the Contract

**5. Contract of sale how made:** (1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

#### Subject-matter of Contract

**6. Existing or future goods:** (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

**7. Goods perishing before making of contract:** Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

**8. Goods perishing before sale but after agreement to sell:** Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

### The Price

**9. Ascertainment of price:** (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

**10. Agreement to sell at valuation:** (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided :

Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

### Conditions and Warranties

**11. Stipulation as to time:** Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

**12. Condition and warranty:** (1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

**13. When condition to be treated as warranty:** (1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the

condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty the fulfilment of which is excused by law by reason of impossibility or otherwise.

**14. Implied undertaking as to title, etc:** In a contract of sale, unless the circumstances of the contract are such as to show a different intention there is—

- (a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass ;
- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods ;
- (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

**15. Sale by description:** Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description ; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

**16. Implied conditions as to quality or fitness:** Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness, for any particular purpose of goods supplied under a contract of sale, except as follows :—

- (1) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose :

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

- (2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality :

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

**17. Sale by sample:** (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

- (2) In the case of a contract for sale by sample there is an implied condition—
  - (a) that the bulk shall correspond with the sample in quality ;
  - (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample ;
  - (c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

### CHAPTER III

#### EFFECTS OF THE CONTRACT

##### Transfer of property as between seller and buyer

**18. Goods must be ascertained:** Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

**19. Property passes when intended to pass:** (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

**20. Specific goods in a deliverable state:** Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

**21. Specific goods to be put into a deliverable state:** Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

**22. Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price:** Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

**23. Sale of unascertained goods and appropriation:** (1) Where there is a contract for the sale of unascertained or future goods by description and goods of

that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

**Delivery to carrier:** (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

**24. Goods sent on approval or "on sale or return":** When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction ;
- (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

**25. Reservation of right of disposal:** (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

**26. Risk 'prima facie' passes with property:** Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not :

Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault :

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

### Transfer of title

**27. Sale by person not the owner:** Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the

consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell :

Provided that, where a mercantile agent is with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

**28. Sale by one of joint owners:** If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owners in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

**29. Sale by person in possession under voidable contract:** When the seller of goods has obtained possession thereof under a contract voidable under section 19 or section 19A of the Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

**30. Seller or buyer in possession after sale:** (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

## CHAPTER IV

### PERFORMANCE OF THE CONTRACT

**31. Duties of seller and buyer:** It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

**32. Payment and delivery are concurrent conditions:** Unless otherwise agreed delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

**33. Delivery:** Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

**34. Effect of part delivery:** A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

**35. Buyer to apply for delivery:** Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

**36. Rules as to delivery:** (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf:

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

**37. Delivery of wrong quantity:** (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

**38. Instalment deliveries:** (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case,

whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

**39. Delivery to carrier or wharfinger:** (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

**40. Risk where goods are delivered at distant place:** Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

**41. Buyer's right of examining the goods:** (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

**42. Acceptance:** The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

**43. Buyer not bound to return rejected goods:** Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

**44. Liability of buyer for neglecting or refusing delivery of goods:** When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods :

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.



## CHAPTER V

**RIGHTS OF UNPAID SELLER AGAINST THE GOODS**

**45. "Unpaid seller" defined:** (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

- (a) when the whole of the price has not been paid or tendered ;
- (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

**46. Unpaid seller's rights:** (1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

- (a) a lien on the goods for the price while he is in possession of them ;
- (b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them ;
- (c) a right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

**Unpaid seller's lien**

**47. Seller's lien:** (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

- (a) where the goods have been sold without any stipulation as to credit ;
- (b) where the goods have been sold on credit, but the term of credit has expired ;
- (c) where the buyer becomes insolvent.

(2) The seller may exercise his rights of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

**48. Part delivery:** Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

**49. Termination of lien:** (1) The unpaid seller of goods loses his lien thereon—

- (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;
- (b) when the buyer or his agent lawfully obtains possession of the goods ;
- (c) by waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

### Stoppage in transit

**50. Right of stoppage in transit:** Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

**51. Duration of transit:** (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

**52. How stoppage in transit is effected:** (1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery shall be borne by the seller.

### Transfer by buyer and seller

**53. Effect of sub-sale or pledge by buyer:** (1) Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto:

Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

(2) Where the transfer is by way of pledge, the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer.

**54. Sale not generally rescinded by lien or stoppage in transit:** (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.

(2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.

(3) Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

## CHAPTER VI

### SUITS FOR BREACH OF THE CONTRACT

**55. Suit for price:** (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

(2) Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

**56. Damages for non-acceptance:** Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

**57. Damages for non-delivery:** Where the seller wrongfully neglects or refuses to deliver the goods to the buyer the buyer may sue the seller for damages for non-delivery.

**58. Specific performance:** Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

**59. Remedy for breach of warranty:** (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods ; but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price ; or

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

**60. Repudiation of contract before due date:** Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

**61. Interest by way of damages and special damages:** (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price—

(a) to the seller in a suit by him for the amount of the price—from the date of the tender of the goods or from the date on which the price was payable ;

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller from the date on which the payment was made.

## CHAPTER VII

### MISCELLANEOUS

**62. Exclusion of implied terms and conditions:** Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

**63. Reasonable time a question of fact:** Where in this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

**64. Auction sale:** In the case of a sale by auction—

- (1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale ;
- (2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner ; and, until such announcement is made, any bidder may retract his bid ;
- (3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction ;
- (4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person ; and any sale contravening this rule may be treated as fraudulent by the buyer ;
- (5) the sale may be notified to be subject to a reserved or upset price ;
- (6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

**64-A. In contracts of sale amount of increased or decreased duty to be added or deducted:** In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time :—

- (a) If such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amounts paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue and recover such addition, and
- (b) If such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay, or be sued for or in respect of such deduction.

**65. Repeal:** Chapter VII of the Indian Contract Act, 1872, is hereby repealed.

**66. Savings:** (1) Nothing in this Act or in any repeal effected thereby shall affect or be deemed to affect—

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or
- (c) anything done or suffered before the commencement of this Act, or
- (d) any enactment relating to the sale of goods which is not expressly repealed by this Act, or
- (e) any rule of law not inconsistent with this Act.

(2) The rules of insolvency relating to contracts for the sale of goods shall continue to apply thereto, notwithstanding anything contained in this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

# THE INDIAN PARTNERSHIP ACT

ACT No. IX of 1932

Whereas it is expedient to define and amend the law relating to partnership ;  
It is hereby enacted as follows :—

## CHAPTER I PRELIMINARY

**1. Short title, extent and commencement:** (1) This Act may be called the Indian Partnership Act, 1932.

(2) It extends to the whole of India, except the State of Jammu and Kashmir.

(3) It came into force on the 1st day of October, 1932, except section 69, which came into force on the 1st day of October, 1933.

**2. Definitions:** In this Act, unless there is anything repugnant in the subject or context,—

- (a) an “act of a firm” means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm ;
- (b) “business” includes every trade, occupation and profession ;
- (c) “prescribed” means prescribed by rules made under this Act ;
- (d) “third party” used in relation to a firm or to a partner therein means any person who is not a partner in the firm ; and
- (e) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, shall have the meanings assigned to them in that Act.

**3. Application of provisions of Act IX of 1872:** The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms.

## CHAPTER II THE NATURE OF PARTNERSHIP

**4. Definition of “partnership”, “partner”, “firm” and “firm name”:** “Partnership” is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually “partners” and collectively “a firm” and the name under which their business is carried on is called the “firm name”.

**5. Partnership not created by status:** The relation of partnership arises from contract and not from status ;

and in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

**6. Mode of determining existence of partnership.**—In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

**EXPLANATION 1.**—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

**EXPLANATION 2.**—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business ;

and, in particular, the receipt of such share or payment—

- (a) by a lender of money to persons engaged or about to engage in any business,
- (b) by a servant or agent as remuneration,
- (c) by the widow or child of a deceased partner, as annuity, or
- (d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof,

does not of itself make the receiver a partner with the persons carrying on the business.

**7. Partnership at will:** Where no provision is made by contract between the partners for the duration of their partnership or for the determination of their partnership, the partnership is “partnership at will”.

**8. Particular partnership:** A person may become a partner with another person in particular adventures or undertakings.

### CHAPTER III

#### RELATIONS OF PARTNERS TO ONE ANOTHER

**9. General duties of partners:** Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

**10. Duty to indemnify for loss caused by fraud:** Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

**11. Determination of rights and duties of partners by contract between the partners:** (1) Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing.

Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing.

**Agreements in restraint of trade:** (2) Notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

**12. The conduct of the business:** Subject to contract between the partners :—

- (a) every partner has a right to take part in the conduct of the business ;
- (b) every partner is bound to attend diligently to his duties in the conduct of the business ;
- (c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners ; and
- (d) every partner has a right to have access to and to inspect and copy any of the books of the firm.

**13. Mutual rights and liabilities:** Subject to contract between the partners—

- (a) a partner is not entitled to receive remuneration for taking part in the conduct of the business ;
- (b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm ;
- (c) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits ;
- (d) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent. per annum ;
- (e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him—
  - (i) in the ordinary and proper conduct of the business, and
  - (ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances ; and
- (f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

**14. The property of the firm:** Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

**15. Application of the property of the firm:** Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

**16. Personal profits earned by partners:** Subject to contract between the partners,—

- (a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm ;



- (b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

**17. Rights and duties of partners after a change in the firm:** Subject to contract between the partners,—

- (a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be ;

after the expiry of the term of the firm: (b) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will ; and

where additional undertakings are carried out: (c) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

## **CHAPTER IV.**

### **RELATIONS OF PARTNERS TO THIRD PARTIES.**

**18. Partner to be agent of the firm:** Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm.

**19. Implied authority of partner as agent of the firm:** (1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority".

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

- (a) submit a dispute relating to the business of the firm to arbitration,
- (b) open a banking account on behalf of the firm in his own name,
- (c) compromise or relinquish any claim or portion of a claim by the firm,
- (d) withdraw a suit or proceeding filed on behalf of the firm,
- (e) admit any liability in a suit or proceeding against the firm,
- (f) acquire immovable property on behalf of the firm,
- (g) transfer immovable property belonging to the firm, or
- (h) enter into partnership on behalf of the firm.

**20. Extension and restriction of partner's implied authority:** The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

**21. Partner's authority in an emergency:** A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

**22. Mode of doing act to bind firm:** In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

**23. Effect of admissions by a partner:** An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm if it is made in the ordinary course of business.

**24. Effect of notice to acting partner:** Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

**25. Liability of a partner for acts of the firm:** Every partner is liable jointly with all the other partners and also severally for all acts of the firm done while he is a partner.

**26. Liability of the firm for wrongful acts of a partner:** Where by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred the firm is liable therefor to the same extent as the partner.

**27. Liability of firm for misapplication by partners:** Where—

- (a) a partner acting within his apparent authority receives money or property from a third party and misapplies it, or
- (b) a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.

**28. Holding out:** (1) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

(2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

**29. Rights of transferee of a partner's interest:** (1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and for the purpose of ascertaining that share, to an account as from the date of the dissolution.

**30. Minor admitted to the benefits of partnership:** (1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48 :

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.

(5) At any time within six months of his attaining majority or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm :

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the person asserting that fact.

(7) Where such person becomes a partner,—

(a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,—

(a) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice.

(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

(9) Nothing in sub-sections (7) and (8) shall affect the provisions of section 28.

## CHAPTER V.

### INCOMING AND OUTGOING PARTNERS.

**31. Introduction of a partner:** (1) Subject to contract between the partners and to the provisions of section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners.

(2) Subject to the provisions of section 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.

**32. Retirement of a partner:** (1) A partner may retire—

- (a) with the consent of all the other partners,
- (b) in accordance with an express agreement by the partners, or,
- (c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement:

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

**33. Expulsion of a partner:** (1) A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the parties.

(2) The provisions of sub-sections (2), (3) and (4) of section 32 shall apply to an expelled partner as if he were a retired partner.

**34. Insolvency of a partner:** (1) Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

**35. Liability of estate of deceased partner:** Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

**36. Rights of outgoing partner to carry on competing business:** (1) An outgoing partner may carry on a business competing with that of the firm and he may advertise such business, but, subject to contract to the contrary, he may not—

- (a) use the firm name,
- (b) represent himself as carrying on the business of the firm, or
- (c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

**Agreements in restraint of trade :** (2) A partner may make an agreement with his partners that on ceasing to be partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits ; and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

**37. Right of outgoing partner in certain cases to share subsequent profits:** Where any member of a firm has died or otherwise ceased to be a partner and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm :

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits ; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

**38. Revocation of continuing guarantee by change in firm :** A continuing guarantee given to a firm or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

## **CHAPTER VI.**

### **DISSOLUTION OF A FIRM.**

**39. Dissolution of a firm:** The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm".

**40. Dissolution by agreement:** A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

**41. Compulsory dissolution:** A firm is dissolved—

- (a) by the adjudication of all the partners or of all the partners but one as involvent, or

- (b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership :

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

**42. Dissolution on the happening of certain contingencies:** Subject to contract between the partners a firm is dissolved—

- (a) if constituted for a fixed term, by the expiry of that term ;
- (b) if constituted to carry out one or more adventures or undertakings by the completion thereof ;
- (c) by the death of a partner ; and
- (d) by the adjudication of a partner as an insolvent.

**43. Dissolution by notice of partnership at will :** (1) Where the partnership is at will the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

(2) The firm is dissolved as from the date mentioned in the notice, as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

**44. Dissolution by the Court.**—At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely :—

- (a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner ;
- (b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner ;
- (c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business ;
- (d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him ;
- (e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land-revenue or of any dues recoverable as arrears of land-revenue due by the partner ;
- (f) that the business of the firm cannot be carried on save at a loss ; or
- (g) on any other ground which renders it just and equitable that the firm should be dissolved.

**45. Liability for acts of partners done after dissolution :** (1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties

for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution :

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

(2) Notices under sub-section (1) may be given by any partner.

**46. Right of partners to have business wound up after dissolution:** On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

**47. Continuing authority of partners for purposes of winding-up:** After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent ; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

**48. Mode of settlement of accounts between partners:** In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed :

- (a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.
- (b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order :—
  - (i) in paying the debts of the firm to third parties ;
  - (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;
  - (iii) in paying to each partner rateably what is due to him on account of capital ; and
  - (iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

**49. Payment of firm debts and of separate debts:** Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

**50. Personal profits earned after dissolution:** Subject to contract between the partners, the provisions of clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken

after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

**51. Return of premium on premature dissolution:** Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was a partner, unless—

- (a) the dissolution is mainly due to his own misconduct, or
- (b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

**52. Rights where partnership contract is rescinded for fraud or misrepresentation:** Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(a) to a lien on, or a right of retention of, the surplus of the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him :

(b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm ; and

(c) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

**53. Right to restrain from use of firm name or firm property:** After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

**54. Agreements in restraint of trade :** Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits ; and notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

**55. Sale of goodwill after dissolution:** (1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.

**Rights of buyer and seller of goodwill:** (2) Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not—

- (a) use the firm name,
- (b) represent himself as carrying on the business of the firm, or



- (c) solicit the custom of persons who were dealing with the firm before its dissolution.

**Agreements in restraint of trade:** (3) Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

## **CHAPTER VII**

### **REGISTRATION OF FIRMS.**

**56. Power to exempt from application of this Chapter:** The State Government of any State may, by notification in the Official Gazette, direct that the provisions of this Chapter shall not apply to that State or to any part thereof specified in the notification.

**57. Appointment of Registrars:** (1) The State Government may appoint Registrars of Firms for the purposes of this Act, and may define the areas within which they shall exercise their powers and perform their duties.

(2) Every Registrar shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

**58. Application for registration.**—(1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating—(a) the firm name, (b) the place or principal place of business of the firm, (c) the names of any other places where the firm carries on business, (d) the date when each partner joined the firm, (e) the names in full and permanent addresses of the partners, and (f) the duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

(2) Each person signing the statement shall also verify it in the manner prescribed.

(3) A firm name shall not contain any of the following words, namely:—“Crown”, “Emperor”, “Empress”, “Empire”, “Imperial”, “King”, “Queen”, “Royal”, or words expressing or implying the sanction, approval or patronage of the Crown or the Central Government or any State Government or the Crown Representative except when the State Government signifies its consent to the use of such words as part of the firm name by order in writing.

**59. Registration.**—When the Registrar is satisfied that the provisions of section 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

**60. Recording of alterations in firm name and principal place of business.**—(1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration, and signed and verified in the manner required under section 58.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it along with the statement relating to the firm filed under section 59.

**61. Noting of closing and opening of branches.**—When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation along with the statement relating to the firm filed under section 59.

**62. Noting of changes in names and addresses of partners.**—When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in section 61.

**63. Recording of changes in and dissolution of a firm.**—(1) When a change occurs in the constitution of a registered firm any incoming, continuing or outgoing partner, and when a registered firm is dissolved any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof; and the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms, and shall file the notice along with the statement relating to the firm filed under section 59.

**Recording of withdrawal of a minor.**—(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorised in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub-section (1).

**64. Rectification of mistakes.**—(1) The Registrar shall have power at all times to rectify any mistake in order to bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm filed under this Chapter.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter, the Registrar may rectify any mistake in such document or in the record or note thereof made in the Register of Firms.

**65. Amendment of Register by order of Court.**—A Court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision; and the Registrar shall amend the entry accordingly.

**66. Inspection of Register and filed documents.**—(1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and on payment of such fee as may be prescribed.

**67. Grants of copies.**—The Registrar shall on application furnish to any person, on payment of such fee as may be prescribed, a copy, certified under his hand, of any entry or portion thereof in the Register of Firms.

**68. Rules of evidence.**—(1) Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

(2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein.

**69. Effect of Non-registration.**—(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firm as a partner in the Firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provision of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceedings to enforce a right arising from a contract, but shall not affect:—

- (a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or
  - (b) the powers of an official assignee, receiver or Court under the Presidency towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.
- (4) This section shall not apply—
- (a) to firms or partners in firms which have no place of business in India, or whose places of business in India are situated in areas to which, by notification under section 56, this Chapter does not apply,
  - or
  - (b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882, or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution, or other proceeding incidental to or arising from any such suit or claim.

**70. Penalty for furnishing false particulars.**—Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

**71. Power to make rules.**—(1) The State Government may make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms, or which shall be payable for the inspection of documents in the custody of the Registrar of Firms or for copies from the Register of Firms: Provided that such fees shall not exceed the maximum fees specified in Schedule I.

(2) The State Government may also make rules (a) prescribing the form of statement submitted under section 58, and of the verification thereof; (b) requiring statements, intimations and notice under sections 60, 61, 62 and 63 to be in prescribed form, prescribing the form thereof; (c) prescribing the form of the Register of Firms, and the mode in which entries relating to firms are to be made therein, and the mode in which such entries are to be amended or notes made therein; (d) regulating the procedure of the Registrar when disputes arise; (e) regulating the filing of documents received by the Registrar; (f) prescribing conditions for the inspection of original documents; (g) regulating the grant of copies; (h) regulating the elimination of registers and documents; (i) providing for the maintenance and form of an Index to the Register of Firms; and (j) generally, to carry out the purposes of this Chapter.

(3) All rules made under this section shall be subject to the condition of previous publication.

## CHAPTER VIII.

### SUPPLEMENTAL.

**72. Mode of giving public notice.**—A public notice under this Act is given—

- (a) where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under section 63, and by publication in the local official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and
- (b) in any other case, by publication in the local official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

**73. \* Repeals.**—The enactments mentioned in Schedule II are hereby repealed to the extent specified in the fourth column thereof.

**74. Savings.**—Nothing in this Act or any repeal affected thereby shall affect or be deemed to affect—

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act, or
- (c) anything done or suffered before the commencement of this Act, or
- (d) any enactment relating to partnership not expressly repealed by this Act, or
- (e) any rule of insolvency relating to partnership, or
- (f) any rule of law not inconsistent with this Act.

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\* Repealed by Act No. 1 of 1938.

SCHEDULE I.

MAXIMUM FEES.

(SEE SUB-SECTION (1) OF SECTION 71).

Document or act in respect of which the fee is payable	Maximum Fees
Statement under section 58 .. ..	Three rupees.
Statement under section 60 .. ..	One rupee.
Intimation under section 61 .. ..	One rupee.
Intimation under section 62 .. ..	One rupee.
Notice under section 63 .. ..	One rupee.
Application under section 64 .. ..	One rupee.
Inspection of the Register of Firms under sub- section (1) of section 66.	Eight annas for inspecting one volume of the Register.
Inspection of documents relating to a firm under sub-section (2) of section 66.	Eight annas for the inspection of all documents relating to one firm.
Copies from the Register of Firms.	Four annas for each hundred words or part thereof.

SCHEDULE II. \*

ENACTMENTS REPEALED.

(SEE SECTION 73).

Year 1	No. 2	Short title 3	Extent of Repeal 4
1872	IX	The Indian Contract Act, 1872.	Exceptions 2 and 3 to sec- tion 27.  The whole of Chapter XI.
1920	Burma Act VIII	The Burma Registration of Business Names Act, 1920.	The whole.

\* Repealed by Act 1 of 1938.

# THE NEGOTIABLE INSTRUMENTS ACT

(ACT No. XXVI of 1881).

**An Act to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques.**

**Preamble.**—Whereas it is expedient to define and amend the law relating to promissory notes, bills of exchange and cheques ; it is hereby enacted as follows :—

## CHAPTER I.

### PRELIMINARY.

1. **Short title.**—This Act may be called the Negotiable Instruments Act, 1881 :

**Local extent, saving of usages relating to hundis, etc. Commencement.**—It extends to the whole of India except the State of Jammu and Kashmir ; but nothing herein contained affects the Indian Paper Currency Act, 1871, section 21, or affects any local usage relating to any instrument in an oriental language : Provided that such usages may be excluded by any words in the body of the instrument which indicate an intention that the legal relations of the parties there-to shall be governed by this Act ; and it shall come into force on the first day of March, 1882.

2. **[Repeal of enactments.] Repealed by the Repealing and Amending Act, 1891 (XII of 1891).**

3. **Interpretation clause.**—In this Act “banker” includes also persons or a corporation or company acting as bankers : and “notary public” includes also any person appointed by the Central Government to perform the functions of a notary public under this Act.

## CHAPTER II.

### OF NOTES, BILLS AND CHEQUES.

4. **“Promissory note.”**—A “promissory note” is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person.

### ILLUSTRATIONS.

A signs instruments in the following terms :

- (a) “I promise to pay B or order Rs. 500.”
- (b) “I acknowledge myself to be indebted to B in Rs. 1,000, to be paid on demand, for value received.”
- (c) “Mr. B. I. O. U. Rs. 1,000.”
- (d) “I promise to pay B Rs. 500 and all other sums which shall be due to him.”

(e) "I promise to pay B Rs. 500, first deducting thereout any money which he may owe me."

(f) "I promise to pay B Rs. 500 seven days after my marriage with C."

(g) "I promise to pay B Rs. 500 on D's death, provided D leaves me enough to pay that sum."

(h) "I promise to pay B Rs. 500 and to deliver to him my black horse on 1st January, next."

The instruments respectively marked (a) and (b) are promissory notes. The instruments respectively marked (c), (d), (e), (f), (g) and (h) are not promissory notes.

**5. "Bill of exchange."**—A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person [or to the bearer of the instrument—if not payable on demand.]

A promise or order to pay is not "conditional", within the meaning of this section and section 4, by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

The sum payable may be "certain", within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made may be a "certain person," within the meaning of this section and section 4, although he is mis-named or designated by description only.

**6. "Cheque."**—A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

**7. "Drawer." "Drawee."**—The maker of a bill of exchange or cheque is called the "drawer"; the person thereby directed to pay is called "the drawee".

**"Drawee in case of need."**—When in the bill or in any indorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need, such person is called a "drawee in case of need".

**"Acceptor."**—After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same or given notice of such signing to the holder or to some person on his behalf, he is called the "acceptor".

**"Acceptor for honour."**—When a bill of exchange has been noted or protested for non-acceptance or for better security and any person accepts it 'supra protest' for honour of the drawer or of any one of the indorsers, such person is called an "acceptor for honour".

**"Payee."**—The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "payee".

8. **"Holder."**—The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

9. **"Holder in due course."**—"Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer,

or the payee or endorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

10. **"Payment in due course."**—"Payment in due course" means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

11. **"Inland instrument."**—A promissory note, bill of exchange or cheque drawn or made in India, and made payable in, or drawn upon any person resident in India, shall be deemed to be an inland instrument.

12. **"Foreign instrument."**—Any such instrument not so drawn, made or made payable shall be deemed to be a foreign instrument.

13. **"Negotiable instrument."**—(1) A 'negotiable instrument' means a promissory note, bill of exchange or cheque payable either to order or to bearer.\*

EXPLANATION I.—A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

EXPLANATION II.—A promissory note,\* bill of exchange\* or cheque is payable to bearer\* which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank.

EXPLANATION III.—Where a promissory note, bill of exchange or cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

(2) A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.

14. **Negotiation.**—When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.

15. **Indorsement.**—When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the "indorser".

\* Under the Reserve Bank of India Act, a promissory note cannot be made payable to bearer; a bill to bearer only if not payable on demand.



**16. Indorsement "in blank" and "in full".**—(1) If the indorser signs his name only, the indorsement is said to be "in blank" and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the indorsement is said to be "in full"; and the person so specified is called the "indorsee" of the instrument.

(2) The provisions of this Act relating to a payee shall apply with the necessary modifications to an indorsee.

**17. Ambiguous instruments.**—Where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election treat it as either, and the instrument shall be thenceforward treated accordingly.

**18. Where amount is stated differently in figures and words.**—If the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid.

**19. Instruments payable on demand.**—A promissory note or bill of exchange, in which no time for payment is specified, and a cheque, are payable on demand.

**20. Inchoate stamped instruments.**—When one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

**21. "At sight." "On presentment." "After sight."**—In a promissory note or bill of exchange the expressions "at sight" and "on presentment" mean on demand. The expression "after sight" means, in a promissory note, after presentment for sight, and, in a bill of exchange, after acceptance, or noting for non-acceptance, or protest for non-acceptance.

**22. "Maturity."**—The maturity of a promissory note or bill of exchange is the date at which it falls due.

**Days of grace.**—Every promissory note or bill of exchange which is not expressed to be payable on demand, at sight or on presentment, is at maturity on the third day after the day on which it is expressed to be payable.

**23. Calculating maturity of bill or note payable so many months after date or sight.**—In calculating the date at which a promissory note or bill of exchange, made payable a stated number of months after date or after sight, or after a certain event, is at maturity, the period stated shall be held to terminate on the day of the month which corresponds with the day on which the instrument is dated, or presented for acceptance or sight, or noted for non-acceptance, or protested for non-acceptance, or the event happens, or, where the instrument is a bill of exchange made payable a stated number of months after sight and has been accepted for honour, with the day on which it was so accepted. If the month in which the period would terminate has no corresponding day, the period shall be held to terminate on the last day of such month.

## ILLUSTRATIONS.

(a) A negotiable instrument, dated 29th January, 1878, is made payable at one month after date. The instrument is at maturity on the third day after the 23th February, 1878.

(b) A negotiable instrument, dated 30th August, 1878, is made payable three months after date. The instrument is at maturity on the 3rd December, 1878.

—(c) A promissory note or bill of exchange, dated 31st August, 1878, is made payable three months after date. The instrument is at maturity on the 3rd December, 1878.

**24. Calculating maturity of bill or note payable so many days after date or sight.**—In calculating the date at which a promissory note or bill of exchange made payable a certain number of days after date or after sight or after a certain event is at maturity, the day of the date, or of presentment for acceptance or sight, or of protest for non-acceptance, or on which the event happens, shall be excluded.

**25. When day of maturity is a holiday.**—When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day.

**EXPLANATION.**—The expression “public holiday” includes Sundays, New Year’s day, Christmas Day : if either of such days falls on Sunday, the next following Monday ; Good Friday ; and any other day declared by the State Government, by notification in the Official Gazette, to be a public holiday.

## CHAPTER III.

## PARTIES TO NOTES, BILLS AND CHEQUES.

**26. Capacity to make, &c., promissory notes, &c.**—Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque.

**Minor.**—A minor may draw, indorse, deliver and negotiate such instrument so as to bind all parties except himself.

Nothing herein contained shall be deemed to empower a corporation to make, indorse or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered.

**27. Agency.**—Every person capable of binding himself or of being bound, as mentioned in section 26, may so bind himself or be bound by a duly authorized agent acting in his name.

A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal.

An authority to draw bills of exchange does not of itself import an authority to indorse.

**28. Liability of agent signing.**—An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally

on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.

**29. Liability of legal representative signing.**—A legal representative of a deceased person who signs his name to a promissory note, bill of exchange or cheque is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such.

**30. Liability of drawer.**—The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided.

**31. Liability of drawee of cheque.**—The drawee of a cheque having sufficient funds of the drawer, in his hands, properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.

**32. Liability of maker of note and acceptor of bill.**—In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of the bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand.

In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default.

**33. Only drawee can be acceptor except in need or for honour.**—No person accept the drawee of a bill of exchange, or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honour, can bind himself by an acceptance.

**34. Acceptance by several drawees not partners.**—Where there are several drawees of a bill of exchange who are not partners, each of them can accept it for himself, but none of them can accept it for another without his authority.

**35. Liability of indorser.**—In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such indorser as hereinafter provided.

Every indorser after dishonour is liable as upon an instrument payable on demand.

**36. Liability of prior parties to holder in due course.**—Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied.

**37. Maker, drawer and acceptor principals.**—The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as

principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be.

**38. Prior party a principal in respect of each subsequent party.**—As between the parties so liable as sureties, each prior party is, in the absence of a contract to the contrary, also liable thereon as a principal debtor in respect of each subsequent party.

#### ILLUSTRATION.

A draws a bill payable to his own order on B, who accepts. A afterwards indorses the bill to C, C to D, and D to E. As between E and B, B is the principal debtor, and A, C and D are his sureties. As between E and A, A is the principal debtor, and C and D are his sureties. As between E and C, C is the principal debtor and D is his surety.

**39. Suretyship.**—When the holder of an accepted bill of exchange enters into any contract with the acceptor which, under section 134 or 135 of the Indian Contract Act, 1872, would discharge the other parties, the holder may expressly reserve his right to charge the other parties, and in such case they are not discharged.

**40. Discharge of indorser's liability.**—When the holder of a negotiable instrument, without the consent of the indorser, destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity.

#### ILLUSTRATION.

A is the holder of a bill of exchange made payable to the order of B, which contains the following indorsements in blank :—

First indorsement, "B."

Second indorsement, "Peter Williams."

Third indorsement, "Wright & Co."

Fourth indorsement, "John Rozario."

This bill A puts in suit against John Rozario and strikes out, without John Rozario's consent, the indorsements by Peter Williams and Wright & Co. A is not entitled to recover anything from John Rozario.

**41. Acceptor bound although indorsement forged.**—An acceptor of a bill of exchange already indorsed is not relieved from liability by reason that such indorsement is forged, if he knew or had reason to believe the indorsement to be forged when he accepted the bill.

**42. Acceptance of bill drawn in fictitious name.**—An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an indorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

**43. Negotiable instrument made, etc., without consideration.**—A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument

with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration, or any prior party thereto.

**EXCEPTION I.**—No party for whose accommodation a negotiable instrument has been made, drawn, accepted or indorsed can, if he had paid the amount thereof recover thereon such amount from any person who became a party to such instrument for his accommodation.

**EXCEPTION II.**—No party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.

**44. Partial absence or failure of money-consideration :** When the consideration for which a person signed a promissory note, bill of exchange or cheque consisted of money, and was originally absent in part or has subsequently failed in part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionately reduced.

**EXPLANATION.**—The drawer of a bill of exchange stands in immediate relation with the acceptor. The maker of a promissory note, bill of exchange or cheque stands in immediate relation with the payee and the indorser with the indorsee. Other signers may by agreement stand in immediate relation with a holder.

#### ILLUSTRATION

A draws a bill on B for Rs. 500 payable to the order of A. B accepts the bill, but subsequently dishonours it by non-payment. A sues B on the bill. B proves that it was accepted for value as to Rs. 400, and as an accommodation to the plaintiff as to the residue. A can only recover Rs. 400.

**45. Partial failure of consideration not consisting of money :** Where a part of the consideration for which a person signed a promissory note, bill of exchange or cheque, though not consisting of money, is ascertainable in money without collateral enquiry, and there has been a failure of that part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionately reduced.

**45A. Holder's right to duplicate of lost bill.**—Where a bill of exchange has been lost before it is over-due, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

## CHAPTER IV

### OF NEGOTIATION.

**46. Delivery.**—The making, acceptance or indorsement of a promissory note, bill of exchange or cheque is completed by delivery, actual or constructive.

As between parties standing in immediate relation delivery to be effectual must be made by the party making, accepting or indorsing the instrument, or by a person authorized by him in that behalf.

As between such parties and any holder of the instrument other than a holder in due course, it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

A promissory note, bill of exchange or cheque payable to bearer is negotiable by the delivery thereof.

A promissory note, bill of exchange or cheque payable to order is negotiable by the holder by indorsement and delivery thereof.

**47. Negotiation by delivery.**—Subject to the provisions of section 58, a promissory note, bill of exchange or cheque payable to bearer is negotiable by delivery thereof.

**EXCEPTION.**—A promissory note, bill of exchange or cheque delivered on condition that it is not to take effect except in a certain event is not negotiable (except in the hands of a holder for value without notice of the condition) unless such event happens.

#### ILLUSTRATIONS

(a) A, the holder of a negotiable instrument payable to bearer, delivers it to B's agent to keep for B. The instrument has been negotiated.

(b) A, the holder of a negotiable instrument payable to bearer, which is in the hands of A's banker, who is at the time the banker of B, directs the banker to transfer the instrument to B's credit in the banker's account with B. The banker does so, and accordingly now possesses the instrument as B's agent. The instrument has been negotiated, and B has become the holder of it.

**48. Negotiation by indorsement :** Subject to the provisions of Section 58, a promissory note, bill of exchange or cheque payable to order, is negotiable by the holder by indorsement and delivery thereof.

**49. Conversion of indorsement in blank into indorsement in full :** The holder of a negotiable instrument indorsed in blank may, without signing his own name, by writing above the indorser's signature a direction to pay to any other person as indorsee, convert the indorsement in blank into an indorsement in full ; and the holder does not hereby incur the responsibility of an indorser.

**50. Effect of indorsement :** The indorsement of a negotiable instrument followed by the delivery transfers to the indorsee the property therein with the right of further negotiation ; but the indorsement may, by express words, restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser or for some other specified person.

#### ILLUSTRATIONS

B signs the following indorsements on different negotiable instruments payable to bearer :—

- (a) "Pay the contents to C only".
- (b) "Pay C for my use".
- (c) "Pay C or order for the account of B".
- (d) "The within must be credited to C".

These indorsements exclude the right of further negotiation by C.

(e) "Pay C".

(f) "Pay C value in account with the Oriental Bank".

(g) "Pay the contents to C, being part of the consideration in a certain deed of assignment executed by C to the indorser and others".

These indorsements do not exclude the right of further negotiation by C.

**51. Who may negotiate :** Every sole maker, drawer, payee or indorsee or all of several joint makers, drawers, payees, indorsees, of a negotiable instrument may, if the negotiability of such instrument has not been restricted or excluded as mentioned in section 50, indorse and negotiate the same.

EXPLANATION.—Nothing in this section enables a maker or drawer to indorse or negotiate an instrument, unless he is in lawful possession or is holder thereof ; or enables a payee or indorsee to indorse or negotiate an instrument, unless he is holder thereof.

#### ILLUSTRATION

A bill is drawn payable to A or order. A indorses it to B the indorsement not containing the words "or order" or any equivalent words. B may negotiate the instrument.

**52. Indorser who excludes his own liability or makes it conditional :** The indorser of a negotiable instrument may, by express words in the indorsement, exclude his own liability thereon, or make such liability or the right of the indorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen.

Where an indorser so excludes his liability and afterwards becomes the holder of the instrument, all intermediate indorsers are liable to him.

#### ILLUSTRATIONS

(a) The indorser of a negotiable instrument signs his name adding the words—"Without recourse".

Upon this indorsement he incurs no liability.

(b) A is the payee and holder of a negotiable instrument. Excluding personal liability by an indorsement "without recourse", he transfers the instrument to B, and B indorses it to C, who indorses it to A. A is not only reinstated in his former rights, but has the rights of an indorsee against B and C.

**53. Holder deriving title from holder in due course :** A holder of a negotiable instrument who derives title from a holder in due course has the rights thereon of that holder in due course.

**54. Instrument indorsed in blank :** Subject to the provisions hereinafter contained as to crossed cheques, a negotiable instrument indorsed in blank is payable to the bearer thereof even although originally payable to order.

**55. Conversion of indorsement in blank into indorsement in full :** If a negotiable instrument after having been indorsed in blank is indorsed in full, the amount of it cannot be claimed from the indorser in full, except by the person to whom it has been indorsed in full, or by one who derives title through such person.

**56. Indorsement for part of sum due :** No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument ; but, where such amount has been partly paid, a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.

**57. Legal representative cannot by delivery only negotiate instrument indorsed by deceased :** The legal representative of a deceased person cannot negotiate by delivery only a promissory note, bill of exchange or cheque payable to order and indorsed by the deceased but not delivered.

**58. Instrument obtained by unlawful means or for unlawful consideration :** When a negotiable instrument has been lost or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party, prior to such holder, unless such possessor or indorsee is, or some person through whom he claims, was a holder thereof in due course.

**59. Instrument acquired after dishonour or when overdue :** The holder of a negotiable instrument, who has acquired it after dishonour, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transferor :

**Accommodation note or bill :** Provided that any person who, in good faith and for consideration, becomes the holder after maturity, of a promissory note or bill of exchange made, drawn or accepted without consideration, for the purpose of enabling some party thereto to raise money thereon, may recover the amount of the note or bill from any prior party.

#### ILLUSTRATION

The acceptor of a bill of exchange, when he accepted it, deposited with the drawer certain goods as a collateral security for the payment of the bill, with power to the drawer to sell the goods and apply the proceeds in discharge of the bill if it were not paid at maturity. The bill not having been paid at maturity, the drawer sold the goods and retained the proceeds but indorsed the bill to A. A's title is subject to the same objection as the drawer's title.

**60. Instrument negotiable till payment or satisfaction :** A negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction.

### CHAPTER V

#### OF PRESENTMENT

**61. Presentment for acceptance :** A bill of exchange payable after sight must, if no time or place is specified therein for presentment, be presented to the drawee thereof for acceptance, if he can, after reasonable search, be found, by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

If the drawee cannot, after reasonable search, be found, the bill is dishonoured.



If the bill is directed to the drawee at a particular place, it must be presented at that place ; and, if at the due date for presentment he cannot, after reasonable search, be found there, the bill is dishonoured.

Where authorised by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.

**62. Presentment of promissory note for sight:** A promissory note, payable at a certain period after sight, must be presented to the maker thereof for sight (if he can, after reasonable search, be found) by a person entitled to demand payment, within a reasonable time after it is made and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

**63. Drawee's time for deliberation :** The holder must, if so required by the drawee of a bill of exchange presented to him for acceptance, allow the drawee forty-eight hours (exclusive of public holidays) to consider whether he will accept it.

**64. Presentment for payment :** Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder.

Where authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.

**EXCEPTION.**—Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof.

**65. Hours for presentment :** Presentment for payment must be made during the usual hours of business, and, if at a banker's, within banking hours.

**66. Presentment for payment of instrument payable after date or sight :** A promissory note or bill of exchange made payable at a specified period after date or sight thereon; must be presented for payment at maturity.

**67. Presentment for payment of promissory note payable by instalments :** A promissory note payable by instalments must be presented for payment on the third day after the date fixed for payment of each instalment ; and non-payment on such presentment has the same effect as non-payment of a note at maturity.

**68. Presentment for payment of instrument payable at specified place and not elsewhere.**—A promissory note, bill of exchange or cheque made, drawn or accepted payable at a specified place and not elsewhere must, in order to charge any party thereto, be presented for payment at that place.

**69. Instrument payable at specified place.**—A promissory note or bill of exchange, made, drawn or accepted payable at a specified place must, in order to charge the maker or drawer thereof, be presented for payment at that place.

**70. Presentment where no exclusive place specified.**—A promissory note or bill of exchange not made payable as mentioned in sections 68 and 69, must be presented for payment at the place of business (if any), or at the usual residence, of the maker, drawee or acceptor thereof, as the case may be.

**71. Presentment when maker, &c., has no known place of business or residence.**—If the maker, drawee or acceptor of a negotiable instrument has no known

place of business or fixed residence, and no place is specified in the instrument for presentment for acceptance or payment, such presentment may be made to him in person wherever he can be found.

**72. Presentment of cheque to charge drawer.**—Subject to the provisions of section 84, a cheque must, in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer.

**73. Presentment of cheque to charge any other person.**—A cheque must, in order to charge any person except the drawer, be presented within a reasonable time after delivery thereof by such person.

**74. Presentment of instrument payable on demand.**—Subject to the provisions of section 31, a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder.

**75. Presentment by or to agent, representative of deceased, or assignee of insolvent.**—Presentment for acceptance or payment may be made to the duly authorized agent of the drawee, maker or acceptor, as the case may be, or, where the drawee, maker or acceptor has died, to his legal representative, or, where he has been declared an insolvent, to his assignee.

**75A. Excuse for delay in presentment for acceptance or payment.**—Delay in presentment for acceptance or payment is excused if the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be within a reasonable time.

**76. When presentment unnecessary.**—No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment, in any of the following cases :—

(a) if the maker, drawee or acceptor intentionally prevents the presentment of the instrument, or,

if the instrument being payable at his place of business, he closes such place on a business day during the usual business hours, or,

if the instrument being payable at some other specified place, neither he nor any person authorized to pay it attends at such place during the usual business hours, or,

if the instrument not being payable at any specified place, he cannot after due search be found ;

(b) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment;

(c) as against any party if, after maturity, with knowledge that the instrument has not been presented—

he makes a part payment on account of the amount due on the instrument,

or promises to pay the amount due thereon in whole or in part,

or otherwise waives his right to take advantage of any default in presentment for payment ;

(d) as against the drawer, if the drawer could not suffer damage from the want of such presentment.

**77. Liability of banker for negligently dealing with bill presented for payment.**—When a bill of exchange accepted payable at a specified bank, has been duly presented there for payment and dishonoured, if the banker so negligently or improperly keeps, deals with or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss.

## **CHAPTER VI**

### **OF PAYMENT AND INTEREST**

**78. To whom payment should be made.**—Subject to the provisions of section 82, clause (c), payment of the amount due on a promissory note, bill of exchange or cheque must in order to discharge the maker or acceptor, be made to the holder of the instrument.

**79. Interest when rate specified.**—When interest at a specified rate is expressly made payable on a promissory note or bill of exchange interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realization of such amount, or until such date after the institution of a suit to recover such amount as the Court directs.

**80. Interest when no rate specified.**—When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of six per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

**EXPLANATION.**—When the party charged is the indorser of an instrument dishonoured by non-payment he is liable to pay interest only from the time that he receives notice of the dishonour.

**81. Delivery of instrument on payment or indemnity in case of loss.**—Any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, bill of exchange or cheque is before payment entitled to have it shown, and is on payment entitled to have it delivered up, to him, or, if the instrument is lost or cannot be produced to be indemnified against any further claim thereon against him.

## **CHAPTER VII**

### **OF DISCHARGE FROM LIABILITY ON NOTES, BILLS**

#### **AND CHEQUES**

**82. Discharge from liability, by cancellation, release and payment.**—The maker acceptor or indorser respectively of a negotiable instrument is discharged from liability thereon—

- (a) to a holder thereof who cancels such acceptor's or indorser's name with intent to discharge him, and to all parties claiming under such holder ;
- (b) to a holder thereof who otherwise discharges such maker, acceptor or indorser, and to all parties deriving title under such holder after notice of such discharge ;

- (c) to all parties thereto, if the instrument is payable to bearer, or has been indorsed in blank, and such maker, acceptor or indorser makes payment in due course of the amount due thereon.

**83. Discharge by allowing drawee more than forty-eight hours to accept.**—If the holder of a bill of exchange allows the drawee more than forty-eight hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.

**84. When cheque not duly presented and drawer damaged thereby.**—(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a larger amount than he would have been if such cheque had been paid.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of the cheque as to which such drawer or person is so discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge and entitled to recover the amount from him.

#### ILLUSTRATIONS

(a) A draws a cheque for Rs. 1,000, and, when the cheque ought to be presented, has funds at the bank to meet it. The bank fails before the cheque is presented. The drawer is discharged, but the holder can prove against the bank for the amount of the cheque.

(b) A draws a cheque at Umballa on a bank in Calcutta. The bank fails before the cheque could be presented in ordinary course. A is not discharged, for he has not suffered actual damage through any delay in presenting the cheque.

**85. Cheque payable to order.**—(1) Where a cheque payable to order purports to be endorsed by or on behalf of the payee the drawee is discharged by payment in due course.

(2) Where a cheque is originally expressed to be payable to bearer the drawee is discharged by payment in due course to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon and notwithstanding that any such endorsement purports to restrict or exclude further negotiation.

**85A. Drafts drawn by one branch of a bank on another payable to order.**—Where any draft, that is, an order to pay money, drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course.

**86. Parties not consenting discharged by qualified or limited acceptance.**—If the holder of a bill of exchange acquiesces in a qualified acceptance, or one limited to part of the sum mentioned in the bill, or which substitutes a different place or time for payment, or which, where the drawees are not partners, is not signed by

all the drawees, all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him unless on notice given by the holder they assent to such acceptance.

**EXPLANATION.**—An acceptance is qualified—

- (a) where it is conditional, declaring the payment to be dependent on the happening of an event therein stated ;
- (b) where it undertakes the payment of part only of the sum ordered to be paid ;
- (c) where, no place of payment being specified on the order, it undertakes the payment at a specified place, and not otherwise or elsewhere ; or where, a place of payment being specified in the order, it undertakes the payment at some other place and not otherwise or elsewhere ;
- (d) where it undertakes the payment at a time other than that at which under the order it would be legally due.

**87. Effect of material alteration. Alteration by indorsee.**—Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties ; and any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of sections 20, 49, 86, 125.

**88. Acceptor or indorser bound notwithstanding previous alteration.**—An acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement notwithstanding any previous alteration of the instrument.

**89. Payment of instrument on which alteration is not apparent.**—Where a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered, or where a cheque is presented for payment which does not at the time of presentation appear to be crossed or to have had a crossing which has been obliterated,

payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon ; and such payment shall not be questioned by reason of the instrument having been altered or the cheque crossed.

**90. Extinguishment of rights of action on bill in acceptor's hands.**—If a bill of exchange which has been negotiated is, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished.

## **CHAPTER VIII**

### **OF NOTICE OF DISHONOUR**

**91. Dishonour by non-acceptance.**—A bill of exchange is said to be dishonoured by non-acceptance when the drawee, or one of several drawees not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused and the bill is not accepted.

Where the drawee is incompetent to contract, or the acceptance is qualified, the bill may be treated as dishonoured.

**92. Dishonour by non-payment.**—A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.

**93. By and to whom notice should be given.**—When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note or the drawee or acceptor of the dishonoured bill of exchange or cheque.

**94. Mode in which notice may be given.**—Notice of dishonour may be given to a duly authorised agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or, where he has been declared an insolvent, to his assignee; may be oral or written; may, if written, be sent by post; and may be in any form; but it must inform the party to whom it is given, either in express terms or by reasonable intendment, that the instrument has been dishonoured, and in what way, and that he will be held liable thereon; and it must be given within a reasonable time after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.

If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid.

**95. Party receiving must transmit notice of dishonour.**—Any party receiving notice of dishonour must, in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time, unless such party otherwise receives due notice as provided by section 93.

**96. Agent for presentment.**—When the instrument is deposited with an agent for presentment, the agent is entitled at the same time to give notice to his principal as if he were the holder giving notice of dishonour, and the principal is entitled to a further like period to give notice of dishonour.

**97. When party to whom notice given is dead.**—When the party to whom notice of dishonour is despatched is dead, but the party despatching the notice is ignorant of his death, the notice is sufficient.

**98. When notice of dishonour is unnecessary.**—No notice of dishonour is necessary—

- (a) when it is dispensed with by the party entitled thereto;
- (b) in order to charge the drawer when he has countermanded payment;
- (c) when the party charged could not suffer damage for want of notice;
- (d) when the party entitled to notice cannot after due search be found; or the party bound to give notice is, for any other reason, unable without any fault of his own to give it;
- (e) to charge the drawers when the acceptor is also a drawer;
- (f) in the case of a promissory note which is not negotiable;

- (g) when the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument.

## CHAPTER IX

### OF NOTING AND PROTEST

**99. Noting.**—When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a notary public upon the instrument, or upon a paper attached thereto, or partly upon each.

Such note must be made within a reasonable time after dishonour, and must specify the date of dishonour, the reasons, if any, assigned for such dishonour, or, if the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured, and the notary's charges.

**100. Protest.**—When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a protest.

**Protest for better security.**—When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder may, within a reasonable time, cause a notary public to demand better security of the acceptor, and on its being refused may, within a reasonable time, cause such facts to be noted and certified as aforesaid. Such certificate is called a protest for better security.

**101. Contents of protest.**—A protest under section 100 must contain—

- (a) either the instrument itself, or a literal transcript of the instrument and of everything written or printed thereupon ;
- (b) the name of the person for whom and against whom the instrument has been protested ;
- (c) a statement that payment or acceptance, or better security, as the case may be, has been demanded of such person by the notary public ; the terms of his answer, if any, or a statement that he gave no answer, or that he could not be found ;
- (d) when the note or bill has been dishonoured, the place and time of dishonour, and, when better security has been refused, the place and time of refusal ;
- (e) the subscription of the notary public making the protest ;
- (f) in the event of an acceptance for honour or of a payment for honour, the name of the person by whom, of the person for whom, and the manner in which such acceptance or payment was offered and effected.

A notary public may make the demand mentioned in clause (c) of this section either in person or by his clerk or, where authorized by agreement or usage, by registered letter.

**102. Notice of protest.**—When a promissory note or bill of exchange is required by law to be protested, notice of such protest must be given instead of notice of dishonour, in the same manner and subject to the same conditions ; but the notice may be given by the notary public who makes the protest.

**103. Protest for non-payment after dishonour by non-acceptance.**—All bills of exchange drawn payable at some other place than the place mentioned as the residence of the drawee, and which are dishonoured by non-acceptance, may, without further presentment to the drawee, be protested for non-payment in the place specified for payment, unless paid before or at maturity.

**104. Protest of foreign bills.**—Foreign bills of exchange must be protested for dishonour when such protest is required by the law of the place where they are drawn.

**104A. When noting equivalent to protest.**—For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

## CHAPTER X

### OF REASONABLE TIME

**105. Reasonable time.**—In determining what is a reasonable time for presentment for acceptance or payment, for giving notice of dishonour and for noting, regard shall be had to the nature of the instrument and the usual course of dealing with respect to similar instruments; and, in calculating such time, public holidays shall be excluded.

**106. Reasonable time of giving notice of dishonour.**—If the holder and the party to whom notice of dishonour is given carry on business or live (as the case may be) in different places, such notice is given within a reasonable time if it is despatched by the next post or on the day next after the day of dishonour.

If the said parties carry on business or live in the same place, such notice is given within a reasonable time if it is despatched in time to reach its destination on the day next after the day of dishonour.

**107. Reasonable time for transmitting such notice.**—A party receiving notice of dishonour, who seeks to enforce his right against a prior party, transmits the notice within a reasonable time if he transmits it within the same time after its receipt as he would have had to give notice if he had been the holder.

## CHAPTER XI

### OF ACCEPTANCE AND PAYMENT FOR HONOUR AND REFERENCE IN CASE OF NEED

**108. Acceptance for honour.**—When a bill of exchange has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon may with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto.

**109. How acceptance for honour must be made.**—A person desiring to accept for honour must, by writing on the bill under his hand, declare that he accepts under protest the protested bill for the honour of the drawer or of a particular indorser whom he names, or generally for honour.



**110. Acceptance not specifying for whose honour it is made.**—Where the acceptance does not express for whose honour it is made, it shall be deemed to be made for the honour of the drawer.

**111. Liability of acceptor for honour.**—An acceptor for honour binds himself to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill if the drawee do not : and such party and all prior parties are liable in their respective capacities to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance.

But an acceptor for honour is not liable to the holder of the bill unless it is presented (or in case the address given by such acceptor on the bill is a place other than the place where the bill is made payable), forwarded for presentment, not later than the day next after the day of its maturity.

**112. When acceptor for honour may be charged.**—An acceptor for honour cannot be charged unless the bill has at its maturity been presented to the drawee for payment, and has been dishonoured by him, and noted or protested for such dishonour.

**113. Payment for honour.**—When a bill of exchange has been noted or protested for non-payment, any person may pay the same for the honour of any party liable to pay the same, provided that the person so paying or his agent in that behalf has previously declared before a notary public the party for whose honour he pays, and that such declaration has been recorded by such notary public.

**114. Right of payer for honour.**—Any person so paying is entitled to all the rights, in respect of the bill, of the holder at the time of such payment, and may recover from the party for whose honour he pays all sums so paid, with interest thereon and with all expenses properly incurred in making such payment.

**115. Drawee in case of need.**—Where a drawee in case of need is named in a bill of exchange, or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.

**116. Acceptance and payment without protest.**—A drawee in case of need may accept and pay the bill of exchange without previous protest.

## CHAPTER XII

### OF COMPENSATION

**117. Rules as to compensation.**—The compensation payable in case of dishonour of a promissory note, bill of exchange or cheque, by any party liable to the holder or any indorsee shall be determined by the following rules :—

- (a) the holder is entitled to the amount due upon the instrument, together with the expenses properly incurred in presenting, noting and protesting it ;
- (b) when the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two places ;
- (c) an indorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at six per centum per annum from the date of payment until tender or realization thereof, together with all expenses caused by the dishonour and payment ;

- (d) when the person charged and such indorser reside at different places, the indorser is entitled to receive such sum at the current rate of exchange between the two places ;
- (e) the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.

## CHAPTER XIII

### SPECIAL RULES OF EVIDENCE

**118. Presumptions as to negotiable instruments.**—Until the contrary is proved the following presumptions shall be made :—

- (a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration ;
- (b) that every negotiable instrument bearing a date was made or drawn on such date ;
- (c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity ;
- (d) that every transfer of a negotiable instrument was made before its maturity ;
- (e) that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon ;
- (f) that a lost promissory note, bill of exchange or cheque was duly stamped ;
- (g) that the holder of a negotiable instrument is a holder in due course :  
Provided that where the instrument has been obtained from its lawful honour or from any person in lawful custody thereof by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration the burden of proving that the holder is a holder in due course lies upon him.

**119. Presumption on proof of protest.**—In a suit upon an instrument which has been dishonoured, the Court shall, on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

**120. Estoppel against denying original validity of instrument.**—No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn.

**121. Estoppel against denying capacity of payee to indorse.**—No maker of a promissory note and no acceptor of a bill of exchange payable to order shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to indorse the same.

**122. Estoppel against denying signature or capacity of prior party.**—No indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument.

## CHAPTER XIV

### OF CROSSED CHEQUES

**123. Cheque crossed generally.**—Where a cheque bears across its face an addition of the words “and company” or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words “not negotiable”, that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.

**124. Cheque crossed specially.**—Where a cheque bears across its face an addition of the name of a banker, either with or without the words “not negotiable”, that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

**125. Crossing after issue.**—Where a cheque is uncrossed, the holder may cross it generally or specially.

Where a cheque is crossed generally, the holder may cross it specially.

Where a cheque is crossed generally or specially, the holder may add the words “not negotiable”.

Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

**126. Payment of cheque crossed generally, Payment of cheque crossed specially.** Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker. Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to a banker to whom it is crossed, or his agent for collection.

**127. Payment of cheque crossed specially more than once.**—Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof.

**128. Payment in due course of crossed cheque.**—Where the banker on whom a crossed cheque is drawn has paid the same in due course, the banker paying the cheque, and (in case such cheque has come to the hands of the payee) the drawer thereof, shall respectively be entitled to the same rights, and be placed in the same position in all respects as they would respectively be entitled to and placed in if the amount of the cheque had been paid to and received by the true owner thereof.

**129. Payment of crossed cheque out of due course.**—Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

**130. Cheque bearing "not negotiable".**—A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable", shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

**131. Non-liability of banker receiving payment of cheque.**—A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

**EXPLANATION.**—A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

**131A. Application of Chapter to Drafts.**—The provisions of this Chapter shall apply to any draft as defined in Section 85A, as if the draft were a cheque.

## CHAPTER XV

### OF BILLS IN SETS

**132. Set of bills.**—Bill of exchange may be drawn in parts, each part being numbered and containing a provision that it shall continue payable only so long as the other remains unpaid. All the parts together make a set; but the whole set constitutes only one bill, and is extinguished when one of the parts, if a separate bill, would be extinguished.

**EXCEPTION.**—When a person accepts or indorses different parts of the bill in favour of different persons, he and the subsequent indorsers of each part are liable on such part as if it were a separate bill.

**133. Holder of first acquired part entitled to all.**—As between holders in due course of different parts of the same set he who first acquired title to his part is entitled to the other parts and the money represented by the bill.

## CHAPTER XVI

### OF INTERNATIONAL LAW

**134. Law governing liability of maker, acceptor or indorser of foreign instrument.**—In the absence of a contract to the contrary, the liability of the maker or drawer of a foreign promissory note, bill of exchange or cheque is regulated in all essential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable.

### ILLUSTRATION

A bill of exchange was drawn by A in California, where the rate of interest is 25 per cent., and accepted by B, payable in Washington, where the rate of interest is 6 per cent. The bill is indorsed in India, and is dishonoured. An action on the bill is brought against B in India. He is liable to pay interest at the

rate of 6 per cent. only ; but, if A is charged as drawer, A is liable to pay interest at the rate of 25 per cent.

**135. Law of place of payment governs dishonour.**—Where a promissory note, bill of exchange or cheque is made payable in a different place from that in which it is made or indorsed, the law of the place where it is made payable determines what constitutes dishonour and what notice of dishonour is sufficient.

#### ILLUSTRATION

A bill of exchange drawn and indorsed in India but accepted payable in France, is dishonoured. The indorsee causes it to be protested for such dishonour, and gives notice thereof in accordance with the law of France, though not in accordance with the rules herein contained in respect of bills which are not foreign. The notice is sufficient.

**136. Instrument made, etc., out of India but in accordance with its law.**—If a negotiable instrument is made, drawn, accepted or indorsed out of India, but in accordance with the law of India, the circumstance that any agreement evidenced by such instrument is invalid according to the law of the country wherein it was entered into does not invalidate any subsequent acceptance or indorsement made thereon in India.

**137. Presumption as to foreign law.**—The law of any foreign country regarding promissory notes, bills of exchange and cheques shall be presumed to be the same as that of India, unless and until the contrary is proved.

### CHAPTER XVII

#### NOTARIES PUBLIC

**138. Power to appoint notaries public.**—The State Government may, from time to time, by notification in the official Gazette, appoint any person, by name or by virtue of his office, to be a notary public under this Act and to exercise his functions as such within any local area, and may, by like notification, remove from office any notary public appointed under this Act.

**139. Power to make rules for notaries public.**—The State Government may from time to time, by notification in the official Gazette, make rules consistent with this Act for the guidance and control of notaries public appointed under this Act, and may, by such rules (among other matters), fix the fee payable to such notaries.

#### SCHEDULE : ENACTMENTS REPEALED

REPEALED BY THE REPEALING AND AMENDING ACT, 1891 (XII OF 1891).

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